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TWO TYPES OF SUBSTANTIVE REASONS: THE CORE OF A THEORY OF COMMON-LAW JUSTIFICATION*

Robert S. Summers†

> It is on the question of what shall amount to a justification, and more especially on the *nature of the considerations* which really determine or ought to determine the answer to that question, that judicial reasoning seems . . . often to be inadequate.
>
> —*O. W. Holmes, Jr.*[1]

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This Article consists of modified (and tentative) versions of several chapters of a book in progress. While working on this subject, I profited from discussions with judges in seminars I conducted for members of the Washington appellate judiciary at Olympia, Washington, on April 19-20, 1977; for members of the Tennessee judiciary at Nashville on Octoher 14-15, 1977; for New England judges at Durham, New Hampshire, on January 14-15, 1978; and for judges participating in the A.B.A. Appellate Judge's Seminar at Tucson, Arizona, on March 23, 1978.

I also benefited from discussions of the thesis of the Article while teaching at a Law for Economists Institute sponsored by the University of Miami on June 21-25, 1977.

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TABLE OF CONTENTS

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[1] Vegelahn v. Guntner, 167 Mass. 92, 105-06, 44 N.E. 1077, 1080 (1896) (dissenting opinion) (emphasis added). Holmes displayed extraordinary methodological self-consciousness in justificatory matters.

INTRODUCTION

Reasons are the tools of judging, for with reasons judges resolve issues and justify decisions. My topic will be reasons in common-law cases. Although I will address appellate judges, this Article should also interest theorists of judging, and of justification in general. And if of value to judges, practitioners should find it useful, too. While I will focus on the common law (including equity), I believe my central theses have wider bearing.

Appellate judges strive not only to reach the best decisions in common-law cases, but also to justify them in written opinions. Good reasons necessarily figure in justified decisions. They ordinarily figure in processes of arriving at the best decisions, too, for judges usually consider reasons supporting each alternative before reaching a decision.

But, at least in nonroutine cases, judges do not invariably reach the best decision. And even when they do, the reasons they give are not infrequently wanting.[2] When judges appeal to precedent—

[2] A familiar point. *See, e.g.*, Pound, *The Theory of Judicial Decision* (pt. 3), 36 HARV. L.

give "authority reasons"—the cited cases may be distinguishable or otherwise without rational bearing. When judges appeal to moral, economic, political, institutional, or other social considerations—give "substantive reasons"—these may be question-begging, insufficiently strong, or otherwise inadequate.[3]

Of course, society cannot expect perfection from mortals. Constructing reasons is not easy. Moreover, a judge often encounters special difficulties. He might have to hurry, and counsel might provide little help. But a judge might also lack the capacity to identify and deploy good authority reasons. Likewise, he might not be well equipped to give good substantive reasons.[4]

Even if a judge is good at giving substantive reasons, he might be uneasy about resorting to them. Solicitous of stare decisis, he might feel that only authority reasons are legitimate. Or he might think that to give substantive reasons is to "legislate" (retroactively at that) and thus to encroach on other agencies of government. In addition, he might believe that such reasons call for personal and subjective value judgments and are therefore inherently suspect. Yet, as I will show, a judge in our system must give substantive reasons and must make law. Indeed, the most important attributes of a judge are his value system and his capacity for evaluative judgment. Only through the mediating phenomena of reasons, especially substantive reasons, can a judge articulately bring his values to bear.[5]

REV. 940, 951 (1923). *See generally* Leflar, *Some Observations Concerning Judicial Opinions,* 61 COLUM. L. REV. 810 (1961).

[3] This is not intended as a formal definition of the phrase "substantive reasons." Rather, it is meant to reflect generally and informally an important distinction between authority reasons and substantive reasons. Although a more precise definition could be formulated, there is no need to do so here. Judges already have a working familiarity with the notion of a substantive reason as distinguished from a reason based on prior legal authority.

[4] There may be various explanations for this. For example, judging is, as I will show, complex in its own ways, and when lawyers ascend to the bench they receive almost no formal instruction in these complexities. Most educational programs for new judges focus on administrative and related matters and on recent developments in specific fields of substantive or procedural law.

[5] For a different formulation, consider these remarks:

> Much of law is designed to avoid the necessity for the judge to reach what Holmes called his "can't helps," his ultimate convictions or values. The force of precedent, the close applicability of statute law, the separation of powers, legal presumptions, statutes of limitations, rules of pleading and evidence, and above all the pragmatic assessments of fact that point to one result whichever ultimate values be assumed, all enable the judge in most cases to stop short of a resort to his personal standards. When these prove unavailing, as is more likely in the case of

In my view, a comprehensive and integrated theory of justification should be highly valuable to judges, if adequate to the complexities and presented in teachable form. In this, the theorists of judging have let the judges down. It is true that there are writings on authority reasons—on precedent—a subject that necessarily figures in any theory of common-law justification.[6] There are also essays on whether courts can and should make law.[7] But, until late, theorists have done little work on substantive reasons—on their varieties, their internal complexities, the differences among them, and the significance of these differences.[8] There are virtually no writings on the capacities required to identify, construct, and evaluate substantive reasons. Essays on the general nature and ends of common-law justification are also rare. And we have no unifying theories purporting to tie all these aspects of reasons and reason-giving together.[9]

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courts of last resort at the frontiers of the law, and most likely in a supreme constitutional court, the judge necessarily resorts to his own scheme of values. It may therefore be said that the most important thing about a judge is his philosophy; and if it be dangerous for him to have one, it is at all events less dangerous than the self-deception of having none.

Freund, *Social Justice and the Law*, in SOCIAL JUSTICE 93, 110 (R. Brandt ed. 1962).

[6] *See, e.g.*, R. CROSS, PRECEDENT IN ENGLISH LAW (1961); R. WASSERSTROM, THE JUDICIAL DECISION chs. 3-4 (1961); APPELLATE JUDICIAL OPINIONS ch. 2 (R. Leflar ed. 1974); Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3 (1966); Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 31 A.B.A. J. 501 (1945).

[7] On the creative roles of judges in common-law cases, see generally R. KEETON, VENTURING TO DO JUSTICE (1969); K. LLEWELLYN, THE COMMON LAW TRADITION (1960).

[8] Perhaps the most significant recent work has been done by Dworkin, Eckhoff, Greenawalt, Hughes, and Wellington. For some of their writings, see note 27 *infra*. Wellington's effort, for example, is illuminating. Nevertheless, he does not discern that the values underlying what I call "goal reasons" may be noninstrumental. Nor does he consider the internal complexity of substantive reasons. Consequently, he misses some of the important differences between various reason types. Yet, in these respects, he is not alone.

[9] The work of the late Roscoe Pound is an exception. Pound saw the importance of general justificatory theory, and offered judges a "theory of interests" (drawn mainly from German thinkers). For a summary of his theory, see 3 R. POUND, JURISPRUDENCE chs. 14-15 (1959). In my view, Pound's theory is fundamentally misconceived; it gives controlling importance to the concept of an interest, whereas any justificatory theory must focus on the concept of a good reason. Furthermore, Pound's fundamental "decision rule"—namely, that judges should reach the decision, among the alternatives, that secures the most interests with the least friction—is deficient in at least three ways: (1) it is vacuous and hence indeterminate; (2) judges cannot possibly know enough to apply it; and (3) it incorporates a minimal theory of the good.

Pound also stressed that judges should evaluate alternative decisions in terms of their likely social effects. He thus neglected an important subset of substantive reasons—those having to do not with predicted decisional effects, but with how the case *came about*. Yet many common-law decisions are based mainly, and properly, on such reasons, which I will call "rightness reasons."

A legal periodical can provide neither space nor format for presentation of a full-scale theory of common-law justification. Here my focus must be far narrower. I will concentrate on only one facet of the theory I have underway, namely, substantive reasons.[10] As I will show, this facet must constitute the core of any comprehensive theory.[11] Yet I cannot even treat all of it here. And, because of the complexity and novelty of the topic,[12] some of my treatment will have to be schematic and tentative at that. Nonetheless, I believe that my theory of substantive reasons is sufficiently developed to invite useful criticism—it has sufficient "body" that proposed modifications need not appear arbitrary, and their consistency with the theory can be more or less readily determined. Also, the theory is now sufficiently detailed to be tested against the realities of common-law justification.[13]

Although relatively new, the theory of substantive reasons I will offer is not a personal contrivance, let alone some utopian ideal. While my effort is not exclusively descriptive, it is in large measure so. Thus, I open with a general survey of the varieties of good reasons and of the complexities of justificatory structures actually found in common-law opinions. Judges at their best actu-

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The general lack of "reasons theory," apart from Pound's work and that of a few others, may be one of the unhappy influences of legal realism. Indeed, in their more extreme moments, some realists suggested that giving justified answers to legal issues is simply impossible. Professor Dworkin's insistence that there is almost always one right answer might be interpreted in part as a salutary overreaction to realist extremism. *See* Dworkin, *No Right Answer?*, in LAW, MORALITY, AND SOCIETY 58 (P. Hacker & J. Raz eds. 1977). For two quite different critiques of Dworkin, see Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991 (1977); Soper, *Metaphors and Models of Law: The Judge as Priest*, 75 MICH. L. REV. 1196 (1977).

[10] I will not treat here the following other facets of the theory I am developing:

(1) the nature and ends of common-law justification;

(2) the nature of the concept of "justificatory force," and how it differs from mere persuasiveness on the one hand, and logical validity on the other;

(3) the theory of precedent and its rationales, and how reasons of substance are transmuted into legal doctrine;

(4) the nature and scope of institutional reasons, including those arisiug from the relations among courts, legislatures, administrative agencies, and private parties as creators and appliers of law; and

(5) a decision procedure for choosing between conflicting sets of reasons, substantive and otherwise.

[11] See Part III *infra* on the primacy of substantive reasons.

[12] *See generally* Bodenheimer, *A Neglected Theory of Legal Reasoning*, 21 J. LEGAL EDUC. 373 (1969). This type of theory has not been so neglected on the continent. See, for example, C. PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT (1963); T. VIEHWEG, TOPIK UND JURISPRUDENZ (1963).

[13] To clothe the theory it has been necessary to devise some special terminology. I have kept this to a minimum, however, and have not invented any new words.

ally work with implicit models of good substantive reasons. Many judges will, if the matter is put to them, agree on what the general features of these models are, and on the extent to which particular reasons conform to them.[14] It does not follow, however, that judges are generally self-conscious about their formulation and deployment of reasons. Of course, it is possible for a judge who is not self-conscious to give good substantive reasons. Just as an inhabitant of a city may regularly find his way about without being able to draw an adequate map of it, a judge may be generally good at giving substantive reasons without being able to describe precisely "what is going on."

It falls to the theorists and other students of judging to discover and articulate the relevant structures and models. Much of my Article will therefore be an exercise in what philosophers sometimes call "rational reconstruction."[15] I will, particularly in Parts IV and V, strive to formulate important aspects of what must be going on (justificatorily, not psychologically)[16] when judges successfully identify, construct, and evaluate substantive reasons.

To the extent my analysis is right, the theory of substantive reasons I offer here should beget better decisions and better justifications. Precisely how, and why, I will explain en route. The importance of reaching the best judicial decisions cannot be gainsaid. When a judge fails to reach the best decision, he may sacrifice justice, liberty, security, or any of a host of other significant values.

It is also important that a judge construct the best justifications. Ideally, he should construct the justification available for each alternative decision, compare these, and then choose the decision supported by the best justification. A judge who goes through this process will more likely reach the best decision.

Even when sure he is arriving at the best decision, a judge may usefully expend additional effort constructing and deploying reasons. In so doing, he may guide other judges to better decisions in future cases. And he may serve still other ends, too. He may

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[14] I base this statement on extensive discussion with a number of judges over the course of several years.

[15] *See* Strawson, *Construction and Analysis*, in THE REVOLUTION IN PHILOSOPHY 97 (1957).

[16] For a brilliant discussion of the distinction between justification and possible accompanying psychological processes, see R. WASSERSTROM, *supra* note 6, ch. 2. Professor Wasserstrom explains how the failure to draw this distinction has badly flawed much of the literature on judicial reasoning. It may be added that the literature is deficient in other ways, too. Theorists have imported irrelevant models from formal logic, and, most important, have failed to consider a wide range of actual examples of judicial reasoning.

render the result more acceptable to the parties, thereby reducing the need for coercive enforcement (with attendant friction, waste, and loss of liberty); and he may render the resulting state of the law (1) more "law-like" and therefore consistent with "rule of law" values (including predictability), (2) more respectworthy and consequently capable of motivating higher levels of conformity generally, and (3) more readily appraisable and thus susceptible of rational revision as conditions and values change.[17]

I turn now to my theory of substantive reasons. In Part I, I will identify substantive reasons as one of several types of reasons that judges give in common-law cases. I will, in Part II, summarize the complexities of common-law justification in which substantive reasons figure. That such reasons are the most important type in the common law will be the thesis of Part III. In Parts IV and V, I will treat the construction and evaluation of the two main types of substantive reasons—what I call "goal reasons" and "rightness reasons." In Parts VI and VII, I will identify the differences between these two types of reasons and consider whether rightness reasons are inevitably reducible to goal reasons. In Part VIII, I will explain the importance of this duality of substantive reasons.

The Article as a whole outlines the core of my general theory of common-law justification. I believe that if the theory is right, it will be of significant value to judges in common-law cases. With an increased consciousness of the nature and role of substantive reasons, and with an enhanced capacity to construct and evaluate such reasons, judges should give better reasons for what they do. Better reasons should in turn beget better results and better law.

I

THE VARIETY OF GOOD REASONS

Common-law justification is varied and complex. Here and in Part II, I will provide an overview of the justificatory landscape. It is important to locate substantive reasons within this broader picture before focusing on their construction and evaluation. Judges who acquire a commanding view of this terrain, and of the place of

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[17] The preceding two paragraphs do not purport to be an exhaustive specification of the ends of common-law justification, a separate topic beyond the scope of this Article. I believe that the adequacy of any particular justification cannot be determined without reference to such ends. For a different view, see T. PERRY, MORAL REASONING AND TRUTH ch. 4 (1976).

substantive reasons within it, will be better equipped to do their work.

A typology of potentially relevant reasons can help a judge in several ways. He might miss a relevant reason altogether, a less likely occurrence if he keeps an exhaustive typology of reasons in mind. In particular, it is not uncommon for judges to miss substantive reasons.[18] Missed substantive reasons frequently account for the criticism: "Right result, wrong reason."[19] Moreover, an overlooked reason might prove decisive, at least when opposing reasons are evenly balanced. Even if not determinative, the reason might strengthen the justification and provide valuable guidance in future cases. Of course, when a judge does reach the right result solely for a wrong reason, his failure to give the right reasons leaves the decision entirely without stated justification.

A judge sometimes fails to disentangle different reasons—even reasons of different types. He might run them together as if they were one.[20] Again, a judge will be less likely to make this error if he keeps a typology of good reasons in mind. Running reasons together usually makes their exact nature more difficult to grasp. This analytic confusion may obscure the force (or lack of force) of reasons and even lead judges to apply inapposite standards of evaluation.[21] It may also lead to misapplication of precedent in later cases.

A judge mindful of the typology will be more fully aware of the differences and relations between substantive reasons and authority reasons, and should thus become better at deploying authority reasons. Authority reasons can easily be misformulated and mistakenly brought to bear. It is therefore all the more important that judges take care when resorting to them. In particular, a judge

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[18] *See, e.g.*, Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (although it notes in footnote that defendant's plant employs over 300 people, court fails to articulate this as goal reason supporting denial of injunction that would shut down plant and reduce local employment).

[19] *See, e.g.*, Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (concurring opinion, Traynor, J.) (in products liability case, majority's decision should have rested not on manufacturer's negligence, but on policies favoring absolute liability).

[20] *See, e.g.*, Groves v. John Wunder Co., 205 Minn. 163, 168, 286 N.W. 235, 237 (1939) (judge fails to set forth distinctly a rightness reason—*i.e.*, decision for defendant would favor contractual bad faith—and a goal reason—*i.e.*, decision for defendant would undermine ability to plan for future).

[21] *See, e.g.*, McConnell v. Commonwealth Pictures Corp., 7 N.Y.2d 465, 475, 166 N.E.2d 494, 500, 199 N.Y.S.2d 483, 490-91 (1960) (in attacking majority's rightness reason for denying recovery (plaintiff committed bribery in performing contract) dissenter resorts to goal reason (denial of recovery will encourage breaches of contract)).

should not invoke an authority reason without identifying and interpreting the substantive reasons "behind" the precedent or rationally attributable to it.[22]

Most judges are mindful that reasons of different types figure in their opinions. For example, a judge might claim that "reason and authority"[23] support his decision or remark that "both utility and justice" require a result.[24] But such cryptic remarks, however suggestive, cannot serve as a typology.

In my view, the typology that follows includes all basic types of good reasons found in common-law cases. Of course, not all that judges say to support their decisions can qualify as reasons. Thus, question-begging "reasons" and emotive appeals do not appear in the typology. It includes only genuine reason types: "substantive reasons," "authority reasons," "factual reasons," "interpretational reasons," and "critical reasons."

A. *Substantive Reasons*

A good substantive reason is a reason that derives its justificatory force[25] from a moral, economic, political, institutional, or other social consideration.[26] There are three main types of substantive reasons: goal reasons, rightness reasons, and institutional reasons.[27]

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[22] *See* notes 78-84 and accompanying text *infra*.

[23] *See, e.g.*, Garrison v. Warner Bros. Pictures, Inc., 226 F.2d 354, 355 (9th Cir. 1955) (defendant's contention "not supported by any authority or reason"); Mier v. Hadden, 148 Mich. 488, 495, 111 N.W. 1040, 1043 (1907) (concurring opinion) (majority's holding supported by "reason and precedent").

[24] *See, e.g.*, Bowles v. Mahoney, 202 F.2d 320, 327 (D.C. Cir. 1952) (dissenting opinion, Bazelon, J.) ("the rule operates to defeat the interests of utility and justice").

[25] The concept of justificatory force, as I use it here, is roughly equivalent to the "essential strength of a reason." The degree of a reason's justificatory force is the reason's most important attribute. In forthcoming work, I will offer an extended analysis of this concept. Among other things, I will argue that the relevant metaphor is not "following" but "supporting." In other words, justificatory force arises not from a deductively valid derivation, but from a reason's supporting relationship to a decision.

[26] The rational bearing of such a consideration does not depend on its recognition in a precedent or other legal authority. Indeed, I contend that for almost any noninstitutional substantive reason given by a court, it is possible to identify a counterpart reason (with almost identical elements) likely to be given in parallel circumstances in daily life.

[27] Others have sought to articulate differences between types of substantive reasons, although no one, so far as I know, has differentiated them in the fashion I do here. For some of these efforts and resulting criticisms, see T. ECKHOFF, JUSTICE 19-25 (1974); E. FREUND, STANDARDS OF AMERICAN LEGISLATION ch. 2 (1917); Dickinson, *The Law Behind Law* (pts. 1 & 2), 29 COLUM. L. REV. 113, 285 (1929); Dworkin, *Seven Critics*, 11 GA. L. REV. 1201 (1977); Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); Dworkin, *Judicial Discre-*

1. *Goal Reasons*

A goal reason derives its force from the fact that, at the time it is given, the decision it supports can be predicted to have effects that serve a good social goal. The goal may or may not have been previously recognized in the law. Below are some examples of goal reasons drawn from actual cases:[28]

(a) *"General safety"*: Because the defendant railroad is financially hard-pressed and *will* improve general safety with the money it saves from not having to perform its contract with the plaintiff, the plaintiff will be denied specific performance.[29]

(b) *"Community welfare"*: Because judicial refusal to recognize the defense of retaliatory eviction *will* make it difficult to maintain decent housing standards, this defense will be recognized.[30]

(c) *"Facilitation of democracy"*: Because the flow of information about candidates for public office *will* facilitate democracy, a newspaper that publishes falsehoods may not be held liable unless the newspaper acted in bad faith.[31]

(d) *"Public health"*: Because a utility's gas reservoir *will* adversely affect the health of people living near it, the utility may be ordered to relocate it.[32]

(e) *"Promotion of family harmony"*: Because allowing this kind of intrafamily lawsuit *will* disrupt family harmony generally, the suit will not be allowed.[33]

All goal reasons are future-regarding. They derive their force from predicted decisional effects that purportedly serve social goals

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tion, 60 J. PHIL. 624 (1963); Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), *reprinted in* ESSAYS IN LEGAL PHILOSOPHY 25 (R. Summers ed. 1968); Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975); Greenawalt, *supra* note 9; Hughes, *Rules, Policy and Decision Making*, 77 YALE L.J. 411 (1968); Lefroy, *The Basis of Case-Law* (pts. 1 & 2), 22 L.Q. REV. 293, 416 (1906); Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973); Winfield, *Ethics in English Case Law*, 45 HARV. L. REV. 112 (1931); Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76 (1928). It is interesting to note that nearly all of the earlier writers cited here have had little or no influence on their successors.

[28] Professor Dworkin has suggested that courts do not "characteristically" give some of the reasons I call goal reasons. *See* Dworkin, *Hard Cases, supra* note 27, at 1060. The case law, however, does not seem to bear him out.

[29] Seaboard Air Line Ry. v. Atlanta, B. & C. R.R., 35 F.2d 609, 610 (5th Cir. 1929).

[30] Dickhut v. Norton, 45 Wis. 389, 397, 173 N.W.2d 297, 301 (1970).

[31] Coleman v. MacLennan, 78 Kan. 711, 741, 98 P. 281, 292 (1908).

[32] Romano v. Birmingham Ry., Light & Power Co., 182 Ala. 335, 340-41, 62 So. 677, 678-79 (1913).

[33] Campbell v. Gruttemeyer, 222 Tenn. 133, 137-40, 432 S.W.2d 894, 896-97 (1968).

in the future. While most goal reasons incorporate general welfare values (as in all of the above examples), some goal reasons are concerned with bringing about more rightness—with rightness values. The parol evidence rule, for example, rests on a goal reason rooted in such values. Consistent application of the rule, which bars the plaintiff from introducing parol evidence of alleged contract terms, supposedly induces more people to commit entire agreements to writing; this, in turn, minimizes the possibility that fraudulent oral "terms" will be enforced.[34] If this particular reason were a good one, it would qualify as a goal reason even though it concerns the achievement of more rightness.

Presently, I will identify a special class of reasons which I call "concomitant parasitic goal reasons"—goal reasons generated by decisions based on rightness reasons. But it is first necessary to introduce and exemplify the notion of a "rightness reason."

2. *Rightness Reasons*

A good rightness reason does not derive its justificatory force from predicted goal-serving effects of the decision it supports. Rather, a rightness reason draws its force from the way in which the decision accords with a sociomoral norm of rightness as applied to a party's actions or to a state of affairs resulting from those actions. The applicability of most such norms cannot be determined without reference to how the case *came about*. (Later, I will elaborate the differences between goal reasons and rightness reasons at length.[35])

Below are some examples of rightness reasons drawn from actual cases:

(a) *"Conscionability"*: Since the seller knowingly took advantage

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[34] *See, e.g.*, Mitchill v. Lath, 247 N.Y. 377, 160 N.E. 646 (1928).

[35] *See* Part VII *infra*. Because some goal reasons are concerned with bringing about more rightness and so may incorporate concepts and norms of right action, the terms "goal reasons" and "rightness reasons" may mislead: they suggest that the former may never concern rightness. Nonetheless, I have used the term "rightness reasons" because such reasons *always* turn on the accordance of a decision with applicable norms of right action. What I call "goal reasons," on the other hand, *always* involve a prediction of future decisional effects. Thus, my terminology is appropriate in at least these important respects. Other pairs of terms I considered but discarded include "forward-looking" vs. "backward-looking," "consequentialist" vs. "nonconsequentialist," and "morality-regarding" vs. "welfare-regarding." These labels are less satisfactory than the terms employed here. Note that what I seek is descriptively felicitous terminology rather than abstractions such as "A-type" and "B-type" reasons. It is almost certain, however, that no single pair of ordinary terms will include and exclude with total accuracy.

of the buyer's illiteracy, ignorance, and limited bargaining capability, the price charged to the buyer must be reduced.[36]

(b) *"Punitive desert"*: Since the seller deliberately misrepresented the mileage on a used car (by turning the odometer back), the buyer may recover punitive damages.[37]

(c) *"Justified reliance"*: Since the builder reasonably relied on the owner's untrue representation of fact and thereby suffered a foreseeable loss, the owner must compensate the builder.[38]

(d) *"Restitution for unjust enrichment"*: Since the owner of a boat has been unjustly enriched by the plaintiff, who found the boat adrift and, at his own expense, took care of it for the owner, the owner must compensate the plaintiff.[39]

(e) *"Comparative blame"*: Since the plaintiff promoted a distinctively named theatrical act by deceitful means, an injunction will not be granted against another who deliberately used the act's name for gain.[40]

(f) *"Due care"*: Since the decedent was negligent, his estate may not recover for his injuries.[41]

(g) *"Relational duty"*: Since the parent brought the dependent child into the world, the parent has a duty to support it.[42]

(h) *"Fittingness or proportionality of remedy"*: Since an injunction would impose a grave burden on the polluting defendant, and the plaintiff would receive only a slight benefit in comparison, the injunction will be denied.[43]

It should be evident that rightness reasons play important roles in common-law justification. Consider, for example, the prominence of justified reliance in contract, blameworthiness in tort, unjust enrichment in the law of restitution, and interpersonal fairness in the various fields of equity.[44]

Among the variety of rightness reasons, two main types stand

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[36] Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 27-28, 274 N.Y.S.2d 757, 758-59 (Dist. Ct. 1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. Term, 2d Dep't 1967).

[37] Boise Dodge, Inc. v. Clark, 92 Idaho 902, 907, 453 P.2d 551, 556 (1969).

[38] Mercanti v. Persson, 160 Conn. 468, 478, 280 A.2d 137, 142 (1971).

[39] Chase v. Corcoran, 106 Mass. 286, 288 (1871).

[40] Howard v. Lovett, 198 Mich. 710, 717, 165 N.W. 634, 636 (1917).

[41] Maki v. Frelk, 40 Ill. 2d 193, 195-96, 239 N.E.2d 445, 447 (1968).

[42] Commonwealth v. Ribikanskas, 68 Pa. D. & C. 336, 337-38 (Phil. Mun. Ct. 1949).

[43] Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 223, 257 N.E.2d 870, 871-72, 309 N.Y.S.2d 312, 315 (1970).

[44] For the nearest thing to a general discussion of the use of rightness reasons throughout the common law, see P. DEVLIN, THE ENFORCEMENT OF MORALS (1951).

out: "culpability" reasons and "mere fairness" reasons. The force of a culpability reason turns on the culpability of the past action of one of the parties to the case. Cases (a) and (b) above are illustrative. In those cases, the actions are culpable in light of relevant sociomoral norms of right action, and these norms require the culpable party to "make amends" for the loss or other adversity he has caused. A culpability reason might also serve to justify denial of a claim, as in cases (e) and (f).

The force of a "mere fairness" reason does not turn on the culpability of a party's past action—indeed, that action might be neutral or even meritorious. Rather, a reason of this kind depends for its force on the fairness or unfairness of leaving the resulting state of affairs between the parties "as is." Cases (c) and (d) are illustrative. According to sociomoral norms of right action (requiring compensation for justified reliance and for unjust enrichment, respectively), the resulting state of affairs between the parties in each case is unfair unless amends are made. Yet the action of each defendant might not be culpable.[45]

Case (g) illustrates another type of rightness reason—one that turns on the past occurrence of what may be characterized as a "relational" undertaking. Indeed, there is a further type of rightness reason—one that turns, as in case (h), on the fittingness or appropriate proportionality of remedy. There may be still other types, but "culpability" and "mere fairness" reasons are the most important, and there is no need to go into others here.

A judge may bring a sociomoral norm to bear through a rightness reason even though the norm has not yet found its way into a common-law decision. Today, many forms of culpability and unfairness are legally recognized, but it does not follow that basic sociomoral norms exist only by virtue of such legal recognition, or that judges have given all the rightness reasons they might give in the name of norms already recognized in the law.

All rightness reasons are either primarily past-regarding or primarily present-regarding. *Most* are primarily past-regarding; they derive their force from how the case *came about*. Cases (a) through (g) fall into this category. Case (h), on the other hand,

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[45] Of course, under appropriate circumstances, a claim of justified reliance or unjust enrichment might also rest partly on a culpability reason. But culpability is not required for such a claim to find support in a "mere fairness" rightness reason. Note that in case (c) I am assuming that the falsity of the representation was not blameworthy.

illustrates a present-regarding rightness reason—contemporaneous equity or fairness in fashioning relief.[46]

I have said only that rightness reasons are *primarily* past-regarding or present-regarding. Actually, a rightness reason may bear on the future by generating a special type of goal reason in two ways. First, insofar as a decision based on a rightness reason is publicized beyond the immediate parties, it constitutes a symbolic, public affirmation of the relevant rightness norm and the values that norm reflects. This affirmation may have desirable socializing effects. Second, a decision based on a rightness reason constitutes a precedent; the decision may influence judges and other actors to decide or act in accordance with the relevant rightness norm in the future. The prediction that a decision will have either of these sorts of beneficial effects (symbolic-affirmational or precedential) generates a future-regarding reason that may be characterized as a "concomitant parasitic goal reason." In our system, this kind of goal reason is a potential concomitant of every rightness reason. The concomitant parasitic goal reason is not itself a rightness reason, although it envisions a resulting state of more rightness. Rather, it is a goal reason, for it contemplates a future state of affairs brought about through decisional effects. It is, nevertheless, only a *parasitic* goal reason—a reason that depends for its force on the antecedent force of the rightness reason on which the affirmation or precedent is based.

If a proposed rightness reason lacks all force, so will its concomitant goal reason. And if a rightness reason is weak, its concomitant goal reason will be weak as well. But a parasitic goal reason might also be weak because of factors unrelated to the rightness reason from which it draws force. In the particular case or realm of human activity, the affirmation or precedent might not make a real difference to future actors, especially actors other than judges. Few might learn of the case prior to acting. Those who learn of it might not understand its bearing. Others might have no incentive to follow it.[47]

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[46] The force of a present-regarding fairness reason does not depend on how the case came about, but on what would be fair treatment of the parties now before the court. The administration of procedural rules affords many examples. That the judge should administer these rules evenhandedly is a present-regarding fairness reason.

[47] *See generally* J. GRAY, THE NATURE AND SOURCES OF THE LAW 100 (1909). Consider also Judge Jerome Frank's skepticism about the extent of actual reliance on precedent expressed in Aero Spark Plug Co. v. B.G. Corp., 130 F.2d 290, 297-98 (2d Cir. 1942) (concurring opinion).

Note that a concomitant parasitic goal reason is distinguishable from the type of goal reason that furthers rightness but which is independent of, rather than parasitic on, the antecedent force of any rightness reason. The parol evidence example given earlier is illustrative. There, a judge sacrificed rightness in the particular case, purportedly to further the social goal of bringing about more rightness (through the predicted effects of a decision adhering to the parol evidence rule).[48]

It is now possible to offer a tabular summary of the most significant varieties of substantive reasons:

SUBSTANTIVE REASONS

Goal Reasons	Rightness Reasons
(1) Nonrightness-regarding—*e.g.*, health, economic productivity, facilitation of democracy	(1) Culpability
	(2) Mere Fairness
	(3) Other
(2) Rightness-regarding	
(a) autonomous (*i.e.*, independent of any accompanying rightness reason)	
(b) concomitantly parasitic	

3. *Institutional Reasons*

An institutional reason is a goal reason or a rightness reason that is "tied" to a specific institutional role or process. It derives its force from the way in which the projected decision would serve goals or accord with norms of rightness applicable to the actions of participants (including officials) in institutional roles and processes. Below are some examples of institutional reasons drawn from actual cases:

(a) Because recognition of the plaintiff's novel claim would necessarily launch the court upon a voyage of arbitrary distinc-

[48] *See* text accompanying note 34 *supra*.

tion-drawing, and because courts, above all institutions, should only decide in accord with principle, the claim will be denied.[49]

(b) Because the plaintiff's claim requires a major change in the common law, a change that the legislature may wish to consider as part of a comprehensive reform of this entire field of the law, the court should abstain and leave the decision to the legislature.[50]

(c) Because the plaintiff's claim calls for a change in the law that cannot justifiably be made without access to "general social facts" that only a legislature can adequately investigate, the court ought not to make the change, but should leave it to the legislature.[51]

(d) Because the issue is now moot, the court should not decide it.[52]

(e) Because the trial judge did not give the claimant a full and fair hearing, the decision must be reversed.[53]

(f) Because it would be impossible to measure damages reliably in cases of this kind, the court ought not to recognize the proposed new cause of action.[54]

(g) Because a court could not supervise the decree, an injunction will be denied.[55]

Even this partial list amply illustrates the diversity of institutional reasons. The values they incorporate, although often hidden from view, are intrinsically no less significant than most values that figure in other substantive reasons. Institutional reasons relate to such important matters as the rational division of legal labor, the efficient workings of judicial machinery, the practicability of remedies, "process values" such as full and fair participation,[56] and even the limits of law's overall efficacy.

I have chosen to isolate institutional reasons as a separate type of substantive reason. As I will later explain, some institutional

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[49] Tobin v. Grossman, 24 N.Y.2d 609, 618-19, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969).

[50] Johnson v. Oman Constr. Co., 519 S.W.2d 782, 786 (Tenn. 1975).

[51] O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill. 2d 436, 440-41, 155 N.E.2d 545, 547 (1959).

[52] Excellent Laundry Co. v. Szekeres, 382 Pa. 23, 114 A.2d 176 (1955).

[53] Whitehead v. Mutual Life Ins. Co., 264 App. Div. 647, 37 N.Y.S.2d 261 (3d Dep't 1942).

[54] Zepeda v. Zepeda, 41 Ill. App. 2d 240, 260-62, 190 N.E.2d 849, 858-59 (1963).

[55] Edelen v. W.B. Samuels & Co., 126 Ky. 295, 307-09, 103 S.W. 360, 363-64 (1907).

[56] *See generally* Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1 (1974).

reasons figure intimately in the force of *noninstitutional* goal or rightness reasons. These reasons might therefore be incorporated into the analysis of noninstitutional reasons rather than classified separately as institutional. But, as I will explain, there are good reasons to classify them separately.

B. *Authority Reasons*

Common-law authority reasons consist primarily of appeals to precedent. In addition, judges sometimes appeal to statutes and regulations by analogy, and to restatements, treatises, and other "authorities."[57] But judges seldom resort to statutory analogy as a source of common law, and the "authority" of restatements and experts usually depends on the force of supporting reasons of substance. For purposes of this typology, it will be enough merely to indicate the major varieties of authority reasons that take the form of appeals to precedent.

First, judges sometimes appeal directly to a nondistinguishable precedent or "line of authority" that is binding on the court.[58] This kind of authority reason derives its justificatory force from two main sources: (1) the substantive reasons behind the precedent itself, and (2) the applicability of further substantive reasons that support the doctrine of precedent.

Second, a precedent might be in point but not binding because of the status or locale of the deciding court. Generally, such authority is cited solely for the intrinsic force of the substantive reasons behind it, or because of the extrinsic consideration of "uniformity."[59] Such reasons derive no force from the doctrine of *binding* precedent.

Third, judges sometimes justify decisions on the basis of analogy to or harmony with prior decisions. The precedent cited might, in light of the substantive reasons behind it, have force by analogy. Or, though not closely analogous, it might have force by virtue of its coherence and harmony with existing authority. For example, once a court has decided that acceptance of an offer by post is

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[57] Judges sometimes even cite law review articles!

[58] Of course, theories and practices differ on what within a precedent is binding. *See generally* Bodenheimer, *supra* note 12, at 374; Simpson, *The Ratio Decidendi of a Case and the Doctrine of Binding Precedent*, in OXFORD ESSAYS IN JURISPRUDENCE 148 (A. Guest ed. 1961); Stone, *The Ratio of the Ratio Decidendi*, 22 MOD. L. REV. 597 (1959); Comment, *Diverse Views of What Constitutes the Principle of Law of a Case*, 36 U. COLO. L. REV. 377 (1964).

[59] For useful discussion of what one theorist calls "trend reasoning," see Bodenheimer, *supra* note 12, at 386-87.

effective on dispatch, it becomes more harmonious to hold that a revocation is effective only on receipt.[60]

A fourth and familiar type of authority reason consists of the formal elaboration of concepts already recognized by the common law. Without appealing to substantive reasons, a judge might argue that the internal logic or content of concepts requires a specific result. For example, he might argue in a given case that no contract could have arisen because one of the parties to the purported contract, a corporation, was not formed at the time the contract was allegedly entered into, and the existence of the relevant parties at the time of contracting is a requirement of our contract law.[61] Here the justificatory appeal is to an existing authoritative state of affairs (built up through precedent), namely, our concept of contract. Such an appeal might or might not ultimately be to binding precedent, and it might even be to precedent that is merely analogous.[62]

C. *Factual Reasons*

Factual reasons are reasons that support findings of fact. A judge in a common-law case may have to justify findings of either "adjudicative" or "legislative" fact.[63] When reviewing rulings on the admissibility of evidence or on motions for a directed verdict, for example, appellate judges pass on findings of adjudicative fact. The force of reasons that support such findings turns partly on whether sufficiently probative relations exist between evidentiary fact and ultimate fact.[64] Such reasoning is often far from "purely factual." It is also rationally influenced in complex ways by goals, norms of rightness, the law's limited machinery for ascertaining truth, and other factors.[65]

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[60] Byrne & Co. v. Leon Van Tienhoven & Co., 5 C.P.D. 344, 348-49 (1880). *See generally* D. HODGSON, CONSEQUENCES OF UTILITARIANISM ch. 5 (1967).

[61] *See* Cramer v. Burnham, 107 Conn. 216, 219, 140 A. 477, 479 (1928) (absent ratification, contract with inchoate corporation unenforceable).

[62] Langdell may have given this kind of reasoning a bad name. *See, e.g.*, C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS § 178 (2d ed. 1880). But not all such reasoning is unsound.

[63] On the distinction between legislative and adjudicative facts, see generally 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 15.03 (1958); Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-10 (1942); Hart & McNaughton, *Some Aspects of Evidence and Inference in the Law*, in EVIDENCE AND INFERENCE 48 (D. Lerner ed. 1958).

[64] For a classic treatment, see J. WIGMORE, THE PRINCIPLES OF JUDICIAL PROOF (1913).

[65] *See generally* R. SUMMERS, TEACHING MATERIALS ON JURISPRUDENCE AND THE LEGAL PROCESS ch. 25 (1977) (unpublished manuscript). The usual theory is that trial judges (and juries) engage in fact-finding while appellate judges engage in fact review. When reviewing

An appellate judge may also have to justify his own conclusions of "legislative" fact.[66] Both ordinary factual reasoning and substantive considerations may figure in this type of fact-finding, too.

D. *Interpretational Reasons*

In many common-law cases judges must justify one interpretation of the text of a private arrangement over alternative interpretations. Such texts include contract language, the language of corporate, partnership, and other articles of association, and the language of wills and trusts.

All of the main types of reasons so far considered—substantive, authority, and factual—may figure in interpretational reasons. But such reasons are in some ways distinctive, too.[67]

E. *Critical Reasons*

The various types of reasons so far listed—substantive, authority, factual, and interpretational—can all be characterized as autonomous reason types. "Critical reasons" are not of this character. Rather, a critical reason merely formulates a criticism of some element or aspect of a given autonomous reason. Critical reasons appear not only in dissents and concurring opinions, but in majority opinions as well. Examples of critical reasons (with references to their corresponding "targets") include:

(a) The proposed goal reason is unsound because it does not involve a good goal.

(b) This rightness reason is unsound because the defendant's action should not be characterized as right.

(c) This rightness reason is unsound because the underlying norm of rightness is unsound.

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rulings on such issues as relevance and weight, appellate judges should bear in mind the extent to which such issues in the law are not purely factual, but are also to be resolved by reference to goal reasons and rightness reasons, and to purely institutional considerations such as the limited efficacy of the law's fact-finding apparatus.

[66] *Cf.* Doe v. Bolton, 410 U.S. 179, 208 (1973) (concurring opinion, Burger, C.J.) (though troubled by majority's notice of scientific data, concedes that Court did not exceed bounds of judicial notice).

[67] Distinguishing features of interpretational reasons include the importance accorded to the intention of the author of the text, and the role played by the language of the text in determining intention. For discussion of the distinctive importance of interpretational reasons, see generally Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L. J. 939 (1967); Halbach, *Stare Decisis and Rules of Construction in Wills and Trusts*, 52 CALIF. L. REV. 921, 922 (1964).

A critical reason derives its character from the element of an autonomous reason to which it is addressed. Thus, to identify the types of critical reasons, it is necessary to isolate the various elements of autonomous reasons—a task I undertake in regard to substantive reasons in Parts V and VI.

II

The Complexity of Justificatory Structures

The structure of the justification in even a seemingly simple common-law case may be complex in several ways. Judges who understand this complexity will not be as likely to misinterpret or misapply precedent. They will also have a better grasp of available justificatory avenues.

Consider first the justificatory structure in the simplest possible case. To the extent that any law is applicable in this case, it is common law. There is only one issue—an issue of law. One reason "lines up" on each side of the issue. The two reasons are readily separable, and easily classified in terms of the foregoing typology. The reasons are of the same type and flatly contradict each other. The issue is resolvable, and the judge resolves it in all-or-nothing fashion. He does not seek to accommodate opposing reasons; one prevails and the other is sacrificed entirely. The prevailing reason bears immediately and directly upon the decision it supports, and since there is only one reason on each side of the issue, the judge need not consider the aggregate force of mutually supporting reasons.

But the usual case is more complex, and some cases are far more complex. Although there are "pure" common-law cases, many cases also involve statutes and other forms of authority that complicate their justificatory structure. Further, while there are "pure" issues of law, many issues are more complex; "mixed" questions of law and fact are illustrative.

Moreover, common-law cases often pose more than one significant issue. In many cases, the problem is not simply whether to affirm or reverse, but how to decide each of several issues in the course of deciding whether to affirm or reverse. And these issues will not always be wholly independent. For example, it is often assumed that so-called liability and remedial issues are completely unrelated. This is false. Some judges treat these issues as interdependent, and properly so. Thus, the drastic consequences of a

remedy might rationally influence the court to decide for a defendant on the issue of liability.[68]

Several reasons—sometimes as many as a half-dozen significant ones—may line up on either side of each issue. Frequently, a single reason will not suffice to justify resolving the issue one way or another. Instead, the cumulative or aggregate force of several reasons will tip the balance toward a particular decision.[69]

When evaluating the bearing of a precedent, a judge often must determine the types of reasons that appear in the cited opinion. Sometimes it will be possible to construe the previous judge's formulation as either a goal reason or a rightness reason. Consider, for example, a case in which the judge dismissed the plaintiff's action because damages would impose a "crushing burden" on the defendant. Such a statement might be construed as a rightness reason—namely, that liability would impose an unfair or disproportionate burden on the defendant as judged in relation to his prior actions (or in relation to the benefit the plaintiff would realize). Alternatively, the reference to a "crushing burden" might be construed as a goal reason to the effect that courts should seek to preserve existing, ongoing economic units rather than throw them into bankruptcy. Sometimes a close look at the facts and the opinion will enable one to determine which type of reason the judge intended to employ. But, regardless of the judge's intent, *both* reasons may properly support the result.

Nor will reasons, whether mutually supporting or opposed, always be of the same type. Reasons of several varieties and subclasses will sometimes line up on each side of an issue or of several issues. In these circumstances, the judge must commensurate different reasons and aggregate the force of reasons of different types.

In addition, a conflict between reasons will not always take the form of straightforward opposition, in which one reason *counterbalances, overrides,* or *outweighs* another. The relation of reason "not-*A*" to reason "*A*" may instead be *cancellative*. For example, the defendant may have intentionally harmed the plaintiff (thus giving rise to a culpability-based rightness reason), but the plaintiff may have assented to the harm, thereby cancelling the entire force of

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[68] *See generally* Keeton, *Rights of Disappointed Purchasers*, 32 TEX. L. REV. 1 (1953).

[69] For a general discussion of cumulative reasons, see Smith, *Cumulative Reasons and Legal Method*, 27 TEX. L. REV. 454 (1949).

the reason.[70] Or the relation of reason not-*A* to reason *A* may be *discountive*. That is, if reason not-*A* is a critical reason rather than an autonomous reason, it may reduce the force of reason *A* in some respect without cancelling it entirely. For example, the goal reason that giving priority to upstream water users "will more fully develop the region" might be criticized as resting on an improbable prediction.[71] This critical reason discounts the force of the relevant reason on the other side of the issue. The foregoing does not purport to be an exhaustive account of the possible relations between conflicting reasons, but it indicates the complexities that may arise, especially when relations between conflicting reasons vary.

Mutually supporting reasons, like conflicting reasons, give rise to complexities. The justificatory bearing of reasons may be intermediate and indirect. Thus, just as some reasons bear on a decision (the "chair") in the fashion of direct supports (the "legs"), other reasons may be one level removed and thus support the direct supports (the "platform" for the legs of the chair).[72]

The complex relationships among reasons often produce complicated results. For example, a judge might not resolve an issue or cluster of related issues in all-or-nothing terms. Instead, he might fashion a compromise in which reasons cutting one way show up in a *general doctrine*, while countervailing reasons shape *exceptions* or *provisos*.[73]

I have not sought to explore exhaustively the justificatory structures found in common-law cases.[74] I believe, however, that I have identified all but one of the principal forms of complexity—the *internal* complexities of substantive reasons. Before turning to these, and to the construction and evaluation of substantive reasons, I will argue for the justificatory primacy of such reasons.

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[70] *See, e.g.*, Ford v. Ford, 143 Mass. 577, 10 N.E. 474 (1887).

[71] *See, e.g.*, Irwin v. Phillips, 5 Cal. 140 (1855). For a general criticism of goal reasoning as too speculative, see Aero Spark Plug Co. v. B.G. Corp., 130 F.2d 290, 295-96 (2d Cir. 1942) (concurring opinion, Frank, J.)

[72] *See, e.g.*, Gerhard v. Stephens, 68 Cal. 2d 804, 442 P.2d 692, 69 Cal. Rptr. 612 (1968).

[73] For a perceptive discussion of how reasons show up in and shape doctrinal formulations, see R. KEETON, *supra* note 7, at 65-69.

[74] The following cases are illustrative of substantial complexity in justificatory structures: Kline v. 1500 Mass. Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970); Meeker v. City of East Orange, 77 N.J.L. 623, 74 A. 379 (1909); Shelley v. Shelley, 223 Or. 328, 354 P.2d 282 (1960).

III

THE PRIMACY OF SUBSTANTIVE REASONS

A specific theory of the nature and role of substantive reasons must form the core of a comprehensive theory of common-law justification. Substantive reasons, more than authority reasons, determine which decisions and justifications are best.

Why might a judge insist on or assume the primacy of authority reasons—or at least adhere to a method in which he merely matches facts and cites precedent? Today there are more than three million reported cases.[75] In almost every case that arises, one precedent will at least be relevant. Moreover, there are strong substantive rationales for following precedent. These include predictability, evenhandedness, efficiency, and the "rule of law" itself.[76] Further, the power of substantive reasons is not unlimited. There may be no strong substantive reasons on either side of an issue, or the substantive reasons on each side may stalemate each other. If so, only authority reasons can tip the balance. Nevertheless, the case for the decisional and justificatory primacy of authority reasons pales when compared with the parallel case for reasons of substance.[77]

A. *Substantive Reasons and the Intelligibility and Scope of Precedent*

A judge cannot apply a precedent wisely without determining which proposed application is most consistent with the substantive reasons behind the precedent.[78] This familiar fact, too frequently forgotten,[79] extends to both routine and difficult cases. Thus, to construct the usual authority reason, a judge must identify and interpret the determinative substantive reasons set forth in the pre-

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[75] M. COHEN, LEGAL RESEARCH IN A NUTSHELL 64-65 (3d ed. 1978).

[76] For discussion of these rationales, see authorities cited in note 6 *supra*.

[77] Thus, the reader will find relatively little in this Article about "reasoning by analogy," an authority-oriented maneuver that has received far more attention in the literature than it merits.

[78] Courts are sometimes quite self-conscious about this approach to determining the scope of a precedent. *See, e.g.*, Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973). For general discussion of the wisdom of this approach, see R. KEETON, *supra* note 7, at 64-69; W. TWINING & D. MIERS, HOW TO DO THINGS WITH RULES 113-18 (1976).

[79] The author of a useful student note persuasively contends that the draftsmen of the Uniform Commercial Code plainly intended its provisions to be applied in light of "their reasons," yet courts have repeatedly failed to do so. *See* Note, *How Appellate Judges Should Justify Decisions Made Under the U.C.C.*, 29 STAN. L. REV. 1245 (1977). Similarly, common-law cases abound in which judges have applied doctrine and precedent without regard to their underlying substantive reasons.

cedent. If no reasons are stated, the judge must go back to prior precedents in the line of authority and dig them out. If even this fails, he must imaginatively construct reasons that are faithful to the materials. The usual precedent ultimately consists of nothing less than facts, issues, rulings, and substantive reasons for those rulings. It is impossible to comprehend a precedent without grasping these elements. It is especially hazardous to try to analyze and interpret precedent without a sure grip on substantive reasons.[80] Of course, when judges simply lay down a rule, one can, within limits, understand its content. But this sort of understanding is significantly incomplete. Without an appreciation of the reasons for the rule, one will usually be unable to determine its justified scope.[81]

In one respect, then, the distinction between a substantive reason and the usual authority reason is misleading, for the usual authority reason cannot be launched without resort to its underlying substantive reasons. Once launched, authority reasons move under their own power, even though partly "made up of" substantive reasons.

I do not claim that the reasons originally given to support a precedent must always determine its scope. Such reasons might be weak or poorly stated. Our traditions, however, provide for this possibility by allowing judges (within limits) to "follow" precedents in light of new or different substantive reasons rationally imputable to those precedents.[82]

Substantive considerations delimit the range of authority reasons. Moreover, judges justifiably advert to the rationales that underlie the doctrine of precedent itself in deciding how far to extend a particular precedent.[83] Although these rationales govern authority reasons, they are substantive in nature, too.

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[80] Limitations of space prohibit the extended discussion necessary to establish this truth. I will explore the question in forthcoming work.

[81] For a perceptive discussion of why the common law cannot be reduced merely to rules, see Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE 77 (A. Simpson ed. 1973).

[82] For example, Chase v. Corcoran, 106 Mass. 286 (1871), was fictionally based on a contractual authority reason, but later came to be cited as a leading unjust enrichment case. In Gerhard v. Stephens, 68 Cal. 2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968), the court referred to the special nature of oil and gas deposits and associated drilling operations as a reason to follow the common-law view that perpetual *profits a prendre* are analogous to perpetual easements and, like easements, may be abandoned through nonuse.

[83] *See, e.g.*, Barnes v. Walker, 191 Tenn. 364, 234 S.W.2d 648 (1950). *See generally* Aero Spark Plug Co. v. B.G. Corp., 130 F.2d 290, 298 (2d Cir. 1942) (concurring opinion, Frank, J.).

An authority-minded judge fails to recognize the primacy of substantive reasons. He is therefore more likely to apply precedent mechanically, in light of the literal meaning of sentences or phrases, rather than in light of underlying substantive reasons.[84] As a result, he may miss relevant precedents, or may rely on precedents not in point.

In sum, judges cannot apply a precedent soundly or consistently if they do not resort to the substantive reasons behind it, and behind the doctrine of precedent itself.

B. *Substantive Reasons and the Paucity or Plethora of Precedent*

To note without more that there are more than three million precedents is to exaggerate the extent of viable case authority. Not all decisions are in common-law fields, and many common-law cases have little precedential value because they involve unique or rarely recurring issues. The precedential significance of other cases is diminished by procedural and similar factors.[85] Change, too, takes its toll on the stock of useful precedent. In short, the conditions for the rational application of precedent are satisfied less frequently than many suppose.

Even at this late date in the history of the common law, a significant number of cases of first impression arise every year.[86] Although they take many forms, cases of first impression by definition cannot be decided solely by reference to precedent. To decide such cases, judges must construct, evaluate, and choose between conflicting reasons of substance.[87]

Cases also arise in which precedents point in opposite directions.[88] Here, too, judges cannot rationally decide without compar-

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[84] *See, e.g.*, Courteen Seed Co. v. Abraham, 129 Or. 427, 275 P. 684 (1929).

[85] For general discussion of factors that may weaken the force of a precedent, see R. CROSS, *supra* note 6, ch. 4; Aigler, *Law Reform by Rejection of Stare Decisis*, 5 ARIZ. L. REV. 155 (1964).

[86] Of course, whether a given case is truly a case of first impression will itself often be contested. At least one party will usually claim that there is a controlling precedent. For a sophisticated argument that there can be no genuine cases of first impression, see Dworkin, *supra* note 9.

[87] The "statutory" common law also generates cases of first impression. Legislatures sometimes block out areas or topics and leave it to the courts to evolve common law within the specified bounds. *See, e.g.*, U.C.C. § 2-302.

[88] Countless examples might be cited to illustrate conflicts of precedent, and these conflicts take a variety of forms. *See, e.g.*, Crenshaw v. Williams, 191 Ky. 559, 231 S.W. 45 (1921). Note also: "The foremost criticism heard today and early voiced by Kent is that the great mass of extant case law often makes it impossible or a task of considerable magnitude to discover precedents, and as often makes it possible to find precedents on both sides of a

ing substantive reasons supporting alternative results. (Of course, judges *could* decide such cases by reference to the comparative stature of the deciding courts, the ages of the precedents, or similar extrinsic factors.)

An authority-minded judge who rejects or remains oblivious to the primacy of substantive reasons will feel more comfortable with cases of conflicting precedent than with cases of first impression. In the former, he will at least have some "law" to apply, and often he will conveniently find that one of the two precedents can be distinguished away,[89] a course not open in a case of first impression.[90]

In cases of first impression, an authority-minded judge may confront a genuine crisis. For him, the law consists solely of authority, yet in such cases there is none. Rather than create a new precedent out of substantive reasons, as has been necessary since the beginning of the common law,[91] the authority-minded judge might rest his decision on precedent not truly controlling. Or he might bend or fictionalize relevant doctrine and thereby dim the lights for future judges.[92]

The vitality of a precedential system (to say nothing of the sound resolution of particular issues) requires that judges understand how important classes of cases arise in which precedents provide no answers, and why in those cases substantive reasons must control. Of course, courts should not proceed to a decision on the merits in all such cases. In some it will be appropriate to defer to the legislature.

C. *Substantive Reasons and the Failure of Predecent: Original Error and Obsolescence*

Although precedents may provide answers, those answers may be wrong. Ours purports to be not only a rule of law, but also a rule of just and good law. Tensions between these two ideals are inevitable.

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given question." Sprecher, *supra* note 6, at 506 (footnotes omitted). *See also* Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961).

[89] *See, e.g.*, White Showers, Inc. v. Fischer, 278 Mich. 32, 270 N.W. 205 (1936).

[90] I certainly do not mean to deny that there are many judges who feel a deep moral obligation to ground every decision in precedent. Although I do not think that this sweeping view is sound, I do not wish to cast douht on the sincerity of the judges who hold it.

[91] *See* Lefroy, *supra* note 27.

[92] *See, e.g.*, Courteen Seed Co. v. Abraham, 129 Or. 427, 275 P. 684 (1929). Many examples of legal fictions are cited and discussed in Fuller, *Legal Fictions* (pts. 1-3), 25 ILL. L. REV. 363, 513, 865 (1930-1931).

Despite the long history of the common law, no one has discovered a way to prevent judges from making mistakes. Thus, at any given time there will be "originally" bad precedents. Further, given the inevitability of change, some precedents are certain to become outmoded. For similar reasons, cases will regularly arise in which judges must consider whether an exception to a precedent should be created, whether the precedent should be extended, or whether several precedents should be synthesized into a new body of doctrine.

Although a legal system might provide that only the legislature may revise precedent, that is not our system. Early on, judges undertook to overrule or otherwise revise case law.[93] The authority-minded judge who is unwilling to construct, evaluate, and choose between reasons of substance cannot perform this work. The rational revision of precedent must proceed in the name of improving the law, and this effort requires that judges give substantive reasons to justify their revisions.[94]

The authority-minded judge takes a more conservative attitude than our system calls for. He will often resist proposed changes when counsel or fellow judges argue that precedent should be overruled. In a fundamental sense, he *might not really understand* what bad or obsolete precedent is. A precedent can be bad or obsolete only in light of substantive reasons; yet an authority-minded judge might refuse to recognize such reasons, or fail to accord them sufficient weight. And even if willing to invoke reasons of substance, he might refuse to acknowledge their primacy. This, in turn, may keep him from seeing how the substantive reasons behind the challenged precedent might have originally lacked sufficient force, or how reasons initially strong might have lost their force through change.[95]

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[93] For a perceptive study of recent judge-made changes in the common law, see R. KEETON, *supra* note 7.

[94] This is not to say, however, that a judge should never cite cases to help justify overruling a precedent.

[95] Technological change, growth in moral enlightenment, social and political developments, or other factors may explain why precedents become obsolete.

Judges have sometimes explicitly recognized the need to identify and revise erroneous or obsolete precedents. *See, e.g.*, Thurston v. Fritz, 91 Kan. 468, 138 P. 625 (1914):

"[W]ith the death of the reason for it every legal doctrine dies."

. . . .

. . . The fact that the reason for a given rule perished long ago is no just excuse for refusing now to declare the rule itself abrogated, but rather the greater justification for so declaring; and if no reason ever existed, that fact furnishes

It is one thing to grasp the primacy of substantive reasons in a healthy common-law system; it is another to comprehend their internal complexity, and to know how to construct and evaluate them systematically. In what follows, I will first take up goal reasons, then rightness reasons. I will explore their internal complexities and their construction and evaluation. Thereafter, I will consider the differences between the two types of reasons and explain the significance of these differences. My sequence of presentation reflects these simple considerations: To appreciate the significance of the differences, one must first understand the differences; and to understand these differences, one must grasp the essential nature of each reason type.

IV

CONSTRUCTION, EVALUATION, AND LEGITIMACY OF GOAL REASONS

I define a goal reason as a reason that derives its force from the fact that, at the time it is given, the decision it supports can be predicted to have effects that serve a good social goal. Goal reasons constitute one of the main types of substantive reasons appearing in common-law opinions.

A. *Construction*

Goal reasons are internally complex, far more so than commonly supposed. Without reference to these internal complexities, judges cannot construct good goal reasons in a systematic and methodologically self-conscious fashion.[96]

There is evidence that judges need to improve their proficiency in constructing goal reasons. For example, a judge might vaguely sense the relevance of a goal reason, yet fail to formulate it *as a reason*.[97] Or he might run together a goal reason and another

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additional justification.

Id. at 474-75, 138 P. at 627 (quoting Harrington v. Lowe, 73 Kan. 1, 21, 84 P. 570, 578 (1906)).

[96] Holmes, it will be recalled, stressed that judges must understand the "nature of the considerations" on which the adequacy of a justification depends. Vegelahn v. Guntner, 167 Mass. 92, 105-06, 44 N.E. 1077, 1080 (1896) (dissenting opinion), *quoted in* text accompanying note 1 *supra*.

[97] *See, e.g.*, Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (although it notes in footnote that defendant's plant employs over 300 people, court fails to articulate this as goal reason supporting denial of injunction that would shut down plant and reduce local employment).

reason and thereby fail to set forth the two as *distinct* reasons.[98] He might mingle foreign elements in his formulation of the reason.[99] He might give a goal reason in which the posited means will fail to serve the relevant goal.[100] He might misstate a goal reason by couching it in unduly conclusory or question-begging terms.[101] Or he might give a goal reason in which the goal is simply undesirable.[102]

To construct a good goal reason a judge must take a number of steps to combine a variety of related internal elements. I will illustrate these elements and steps by using an actual case.[103] Assume that the plaintiff office-holder claims that the defendant newspaper libeled him during his campaign for reelection. At the

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[98] *See, e.g.*, Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854) (court fails to separate goal of facilitating contract planning from rationale of safeguarding defendants against liability greatly disproportionate in light of quid pro quo).

[99] *See, e.g.*, Cornpropst v. Sloan, 528 S.W.2d 188, 199 (Tenn. 1975) (dissenting opinion) (reference to irrelevant adverse effect—impact on inner cities—mingled with statement of reason in personal injury action).

[100] *See, e.g.*, Mitchill v. Lath, 247 N.Y. 377, 160 N.E. 646 (1928) (to further goal of preventing future fraud, court purports to adhere strictly to parol evidence rule although evidence overwhelmingly established extrinsic term and underlying means-goal hypothesis seems highly questionable).

It is odd that while jurisprudential literature abounds on the lawyer's prediction of judicial decisions, there is relatively little on the judge's prediction of the effects of his decisions.

[101] *See, e.g.*, Horsley v. Hrenchir, 146 Kan. 767, 73 P.2d 1010 (1937) (in denying plaintiff recovery, majority uses goal reason that allowing recovery would undermine security and certainty of title provided by written deeds; but, in concurring judge's view, majority fails to consider soundness or strength of reason's internal elements).

Note that the time and effort a judge spends in articulating a reason will often depend on the extent to which he believes that others take for granted the values implicit in the reason.

[102] Bad goals espoused by courts are often simply goals that courts have failed to specify in sufficiently narrow terms or with the necessary qualifications. For example, "promoting limited freedom of contract" is a good goal—its pursuit is rational as long as conflicting goals and rightness factors are properly taken into account. But "promoting *unlimited* freedom of contract" is a bad goal, since its pursuit would rule out the relevance of other goals and rightness considerations that may in fact be relevant. Many goals traditionally pursued by common-law courts, if described very broadly, would be universally condemned. We generally accept, for example, the goal of securing rights in private property; we reject, however, the goal of facilitating slavery, which many antebellum courts pursued under an overly broad, illegitimate definition of "property." A contemporary example of a bad general goal that some common-law courts have adopted is the goal of recognizing and facilitating unionization in public employment. *See, e.g.*, Chicago Div. of Ill. Educ. Ass'n v. Board of Educ., 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966). For the arguments that this goal is, indeed, bad, see R. SUMMERS, COLLECTIVE BARGAINING AND PUBLIC BENEFIT CONFERRAL: A JURISPRUDENTIAL CRITIQUE (1976).

[103] Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908). I am not unmindful that there is post-1908 law on the issues posed in this case.

close of the trial, the evidence supported a finding that the defendant libeled the plaintiff, but only negligently, not recklessly or deliberately. The trial judge instructed the jurors that if they reached this finding, they should return a verdict for the defendant. The plaintiff duly excepted, the jury found for the defendant, and the plaintiff appeals. Assume that this is a case of first impression. The appellate court is now thinking about what substantive reasons support affirmance or reversal.

The following outline sets forth the steps (though not necessarily in prescribed sequence) that a methodologically self-conscious judge might take to construct a good goal reason bearing on this decision. At each step I will identify the relevant internal element of the reason.

(1) The judge must determine from the proceedings below and the general decisional context all facts relevant to the goal-serving potential of alternative decisions: Who did what to whom? With what results? Why? In what context? For example, was the defendant newspaper carrying news of political campaigns? Does it usually? Do newspapers generally?[104]

(2) The judge must then predict the effects that alternative decisions will have on the parties to the case, on at least those third parties within the zone of immediate effects, and on parties in similar situations in the future. For example, if courts impose liability on newspapers for merely negligent libel, what will be the added expense to newspapers of continuing their business? Will newspapers be able to pass on this added expense to readers and advertisers through increased prices? If not, will newspapers choose to provide less information about candidates? Will this, in turn, lead to a decrease in the number of voters going to the polls?

Alternatively, will a refusal to impose liability deter potential candidates from seeking office for fear of being negligently maligned?

Finally, what is the degree of likelihood of any of these predictions?

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[104] Of course, in one sense, a judge cannot identify facts relevant to a particular goal without first identifying or positing that goal; otherwise, all facts would have to be considered relevant. Still, a judge can survey the facts and decisional context of a case to determine which alternative goals are at least in the ballpark—*i.e.*, which goals might conceivably be served or disserved by a particular decision in the case. In a sale-of-goods case, for example, one possibly relevant goal would be furthering certainty in commercial transactions. Furthering exploration of outer space, on the other hand, would probably not be relevant.

Note that rules imposing liability for negligent libel might apply in other jurisdictions, and that the resulting states of affairs might shed light on the foregoing questions.

(3) Next, the judge must characterize the resulting states of affairs predicted for each alternative. In the present example, is it appropriate to say that a decision leading to a decrease in voter participation (or leading to an increase in the number of political candidacies) diminishes or enhances "democracy"? What is the essential nature of democracy anyway? It is one thing to predict the "brute facts" of a state of affairs, and quite another to characterize that future state of affairs in appropriate conceptual (perhaps even evaluative) terms. Thus, predicting that a reduced flow of information about candidates will decrease voter turnout is not necessarily the same as concluding that democracy will be diminished.

(4) The judge must next determine whether any of the alternative predicted states of affairs either affect public interests or represent particular instances of such interests, and therefore qualify as *social* goals. As I will explain, merely personal goals of a party or of the judge that neither affect nor instantiate public interests cannot qualify as social goals. The interest must be fairly attributable to the relevant community as a whole or to a significant segment thereof.[105]

In giving a reason that serves a social goal, a judge may think of at least one of the parties to the case as a kind of "social agent" whose actions affect relevant public interests. For example, a newspaper's political coverage may affect public interests by informing citizens of the quality of candidates for public office, or by deterring good candidates from running for fear of being maligned.

In other cases, predicted states of affairs will merely constitute instances of public interests. While such decisions might have substantial impact on a party and perhaps on a few related persons as well (*e.g.*, his family, neighbors, or business associates), they might not otherwise have significant community effects. For example, protecting the personal health of several families in a neighborhood might count as an instance of a public interest, even though it will not significantly affect the community as a whole. Because the community *does* have an interest in the health of its members, however, it has an interest in the health of these individual families. Similarly, an individual's desire to engage in a particular business,

[105] I do not postulate a solidarity of interests; interests commonly conflict.

although likely to have limited impact on the community, still qualifies as an instance of a public interest; the community has an interest in allowing people to determine the course of their own lives and careers within the limits of social tolerance.

Certain types of merely personal ends, however, neither affect nor instantiate public interests. A judge's desire to be reelected, for example, cannot qualify as a valid reason for deciding a case one way or the other. Likewise, providing one business with an advantage over competitors usually cannot qualify as affecting or instantiating a public interest, although desired by a party to the case. Society has no interest in seeing a particular judge reelected, *especially* if he decides cases on the basis of his political ambitions. Nor does society ordinarily have an interest in merely giving one business a competitive advantage over others. These interests are merely personal. They cannot qualify as *social* interests and, therefore, cannot figure in goal-serving reasons.[106]

(5) If the predicted results of a decision affect or instantiate a public interest and thus qualify as *social*, further questions arise. Which of the effects, if any, are *generally good*? Which are *generally bad*? Only effects that serve a good social goal can qualify as generally good.[107] Thus, if imposing liability on newspapers for negligent libel will encourage more good candidates to run for office by reducing their fears of negligent malignment, the state of affairs resulting from a decision to impose liability might be independently appraised as good (on the ground that it facilitates democracy, a good thing). As such, the state of affairs qualifies as a good social goal, and may generate a "positive" goal reason—one favoring liability in our example.

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[106] I am indebted to Mr. Leigh Kelley for assistance in the formulation of the distinction between social and nonsocial goals. This distinction is particularly elusive and I welcome suggestions. In fact, an alternative approach could be taken here: Eliminate step (4) and collapse it into step (5) on the general goodness or badness of the goal. Some factors or considerations relevant to step (4) and not fully reflected in step (5) might generate institutional reasons bearing on whether a *court* ought to adopt the particular goal in question. The nature, variety, and interrelatedness of the goals that figure in goal reasons are themselves complex topics that call for considerable research. *See generally* Summers, *Naive Instrumentalism and the Law*, in LAW, MORALITY, AND SOCIETY 119, 120-24 (P. Hacker & J. Raz eds. 1977).

[107] Note that the same effects that constitute the brute facts of a predicted state of affairs may be susceptible to characterization in terms of more than one goal. For example, the same state of affairs that will result from imposing liability in our illustrative case might be characterized in terms of increased information, more voting, or greater social solidarity resulting from a wider dispersal of information.

But some predicted effects of a decision might disserve a good social goal. For example, imposing liability might cause newspapers to reduce their campaign coverage; this might lead to a decrease in the flow of information about candidates and a decline in voter turnout. These effects might be viewed as inconsistent with the goal of facilitating democracy and therefore characterized as bad. As such, they could only generate a "negative" goal reason—one opposing liability in our example.

In this fifth step, the judge must appraise predicted decisional effects and determine, in light of independent values, whether the effects serve or disserve good social goals. Even if the judge has appropriately characterized the brute facts of a predicted state of affairs (in step (3)) and has properly concluded that the state of affairs affects or instantiates a public interest (in step (4)), it does not necessarily follow that producing that state of affairs will serve or disserve a good social goal. Furthermore, even if the goal purportedly served by the predicted state of affairs is widely accepted in the community, the judge must, in this fifth step, appraise the goal in light of independent values.[108] If he constructs a reason in which the goal, although widely shared, is bad in light of these values, the justificatory force of the reason cannot be fully genuine, but must to a large extent be merely conventional. In our example, of course, facilitating democracy is not merely a conventional goal, but is also independently appraisable as good.

(6) Moreover, the judge must consider not only whether the predicted effects of alternative decisions *generally* serve or disserve a good social goal, but also whether any predicted increase in goal subservience is really needed, or whether any predicted reduction in goal subservience is really prejudicial. He must inquire more particularly into the desired level of goal subservience and the impact of projected decisions on that level.

A "positive" goal reason—for example, a reason that favors imposing liability in our case because this would reduce potential candidates' fears of negligent malignment and encourage more of them to run—is not a good goal reason if this additional encouragement is unnecessary. That is, if enough good candidates will run regardless of whether newspapers are subject to liability for negligent libel, the further encouragement attributable to imposing

[108] For another discussion of the need to evaluate goals, see Bodenheimer, *supra* note 12, at 394.

liability is not desirable, despite the goodness of the *general* goal of facilitating democracy by encouraging qualified persons to run.

Similarly, a "negative" goal reason—for example, a reason opposing liability in our case because such liability would cause newspapers to cut back on their campaign coverage and thus lead to a diminished flow of information and decreased voter turnout—is not a good goal reason if diminished information and reduced voter turnout are not really prejudicial. That is, if enough information will still be provided and enough voting will still occur regardless of whether newspapers are subject to liability for negligent libel, the decrease in information or voting attributable to imposing liability will not be undesirable. This holds true despite the goodness of the *general* social goal of facilitating democracy by publishing political information and stimulating voter turnout.

In sum, judges must not only consider whether the goals served or disserved by alternative decisions are generally good in themselves; judges must also consider what levels of goal subservience are desirable, and what impact changes in legal rights and duties (with their attendant costs) will have on those levels. Note that this inquiry reintroduces in part the predictive element of step (2). But here the judge predicts not just the decision's effects as such, but the extent to which those effects serve or disserve a desired level of goal realization.

(7) Finally, the judge must formulate the reason clearly, and in appropriate general terms.[109] For example: "Defendant should not be held liable for merely negligent libel because such liability would cause this newspaper and other newspapers to become unduly cautious in providing information about candidates for public office, and this in turn would reduce voting and thus significantly diminish democratic governance. Judgment affirmed."[110]

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[109] On the appropriate generality of reasons, see the exchange between Dean Edward Levi and Professor Herbert Wechsler: Levi, *The Nature of Judicial Reasoning*, and Wechsler, *The Nature of Judicial Reasoning*, in LAW & PHILOSOPHY 263, 290 (S. Hook ed. 1964). See also the perceptive essay by MacCormick, *Formal Justice and the Form of Legal Arguments*, 6 ETUDES DE LOGIQUE JURIDIQUE 103 (C. Perelman ed. 1976).

[110] In the foregoing illustration, the judge proceeds from the construction and articulation of one available goal reason directly to his conclusion, namely, affirmance of the judgment below. While this fulfills my illustrative aim, the judge in an actual case must usually go much further. He must also (1) formulate any opposing goal reasons, again using the procedure I have just outlined in the text; (2) formulate any opposing rightness reasons, using the procedure outlined in Part V *infra*; (3) formulate any other supporting goal reasons and rightness reasons; and (4) resolve the conflicts between opposing reasons

The foregoing account of the steps and the elements involved in the construction of a good goal reason is necessarily schematic. I have not stopped to describe any of the elements in detail. Nor have I considered where they come from or how they are related. I have not explored the complexities and difficulties of each step (including the ways in which each might go awry). Nor have I discussed the value sensitivities, skills, and capacities required of a judge in performing each step (including the capacity for sound judgment). Although I will eventually treat all of these topics, the foregoing must suffice for purposes of this Article.

Although schematic, the account I have given qualifies as a general analysis of the anatomy and physiology of a goal reason. As such, it represents an effort to unpack "public policy," a phrase judges often use, yet rarely analyze. Furthermore, the analysis explains how and why a good goal reason has justificatory force. In terms of suggestive metaphors, it identifies those "organs" of a goal reason that make it "function"; the "internal mechanisms" of a goal reason that make it "fire"; the "blueprint" and the "materials" from which a goal reason is successfully "constructed."[111]

A judge need not consciously go through each step in the analysis to come up with every goal reason relevant to a case. Some goal reasons are easier to construct than others, and even a judge who is not methodologically self-conscious may get such reasons right. Moreover, counsel will often construct relevant goal reasons for the judge. Even here, however, the judge must evaluate proffered reasons, and this will frequently require reviewing at least some of the relevant steps.

On the other hand, the judge who does go through all the steps consciously and systematically will not necessarily come up with any or all relevant goal reasons. Other things might go amiss. Certain value sensitivities, skills, and capacities are called for, and no judge always commands them all, no matter how qualified. Furthermore, the justificatory resources might simply fail to provide

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to reach a final decision. This fourth step is especially important, but I have chosen not to address it in this already extended Article.

[111] I do not claim that the justificatory resources afforded by the facts and decisional context of a case may only generate one good goal reason. They may generate more than one, and these may be mutually supporting or in conflict. If in conflict, the reasons may incorporate the same goal or two different goals. In the libel illustration, for example, it might be argued that liability for merely negligent libel would facilitate democracy more than nonliability, since nonliability discourages worthy potential candidates who wish to avoid exposing themselves even to negligent malignment.

the materials needed to construct a good goal reason. Nonetheless, I claim that, given the necessary resources, the judge who conducts the analysis I have outlined above will, in general, construct and articulate reasons more successfully than judges who do not so proceed.

Whether the process of constructing goal reasons of the kind found in common-law cases is equivalent or reducible to what economists call "cost-benefit analysis" is an interesting and important question, but I cannot explore it here.[112]

B. *Evaluation*

Of course, in performing their decisional and justificatory tasks judges must not only construct goal reasons but evaluate and grade them as well. In fact, construction and evaluation are intimately related, for judges must evaluate each element of a potential reason *in the course of constructing it*. Judges must also evaluate the reasons presented by their brethren in chambers, in conference, and in draft opinions. They must evaluate reasons given by judges in prior cases cited by counsel. And they must evaluate reasons proposed by counsel and by law clerks.[113]

There is evidence that judges need to improve their proficiency in evaluating goal reasons. For example, a judge might purport to give a good goal reason when he lacks the required facts or some other element necessary to construct the reason.[114] Or a judge might discard or deemphasize a goal reason that should figure prominently in his opinion.[115] Indeed, he might fail to select and stress the best reason of all supporting his decision. He might

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[112] For articles and bibliography on cost-benefit analysis as used by economists, see JOINT ECONOMIC COMM., 91ST CONG., 1ST SESS., THE ANALYSIS AND EVALUATION OF PUBLIC EXPENDITURES: THE PPB SYSTEM (Comm. Print 1969). For an effort to apply such analysis to common-law issues, see R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977). The *Journal of Legal Studies* and the *Journal of Law and Economics* often publish studies that apply cost-benefit analysis of one form or another to resolve legal questions or to explain and justify those resolutions. For an interesting discussion of one of Posner's main theses, see Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

[113] Evaluation of a reason offered by someone else calls for recognition and appraisal of the elements that would have been used in its construction.

[114] *See, e.g.*, Irwin v. Phillips, 5 Cal. 140 (1855) (decision to allow miners' construction of dams justified by court as furthering development of public mineral lands; court evidently failed to consider that decision might have opposite result, since dams might render downstream areas unworkable by conventional mining methods).

[115] *See, e.g.*, Mercanti v. Persson, 160 Conn. 468, 280 A.2d 137 (1971) (court neglects goal of efficient protection of property against fire loss).

give a weak goal reason or even a nonreason.[116] Or he might give a goal reason likely to grow into a legal weed.[117]

I believe my analysis of the "building-blocks" of a good goal reason identifies all relevant focal points of evaluation—all respects in which a goal reason might be strong or weak. The fusion of these elements accounts for the force of a good goal reason. If a required element is missing, construction of a good goal reason will not be possible. And if a required element is weak—such as an improbable effect or an uncertain fact—the strength of the reason will diminish. Thus, to evaluate a goal reason systematically, the judge must both identify and assess the various elements that figure in its construction.

To illustrate, let us hypothesize a judge, Judge Endz, who in our libel example proposes to hold the defendant newspaper not liable for merely negligent libel. His draft opinion reads: "Because imposing liability for merely negligent libel would cause this newspaper and other newspapers to become unduly cautious in providing information about candidates for public office, and this in turn would reduce voting and thus significantly diminish democratic governance, the defendant is not liable."

Let us also imagine a dissenting judge who attempts to formulate a comprehensive set of criticisms of the proposed goal reason —a criticism for each element. Perhaps no proposed reason would ever have to undergo such an all-out attack, but hypothesizing a point-by-point critique will sharpen the illustration. Some of the specific criticisms formulated by the dissenter will be unconvincing, but they will serve to illustrate the relevant types of criticism a judge might convincingly offer with respect to other goal reasons. Note, too, that the following arguments are not autonomous substantive reasons, but are criticisms of one or more elements of the autonomous goal reason offered by Judge Endz.

(1) The evidence supplied by the record and other permissible sources might fail to establish that the party whose activity supposedly serves a social goal was in fact engaging in this activity when the case arose, or even that the party stands as a representa-

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[116] *See, e.g.*, Monge v. Beebe Rubber Co., 115 N.H. 130, 133, 316 A.2d, 549, 551 (1974) (court concludes that employers' malicious or bad-faith dismissals will adversely affect "economic system," although result appears highly improbable).

[117] *See, e.g.*, Rowland v. Christian, 69 Cal. 2d 108, 120-21, 443 P.2d 561, 569, 70 Cal. Rptr. 97, 105 (1968) (dissenting opinion) (majority's "enhanced safety" reason for abolishing common-law distinction between tort liabilities to trespassers and to invitees will open door to unlimited liability and generate uncertainty).

tive of those who engage in such activity. Thus, the dissenter might be warranted in saying: "This newspaper was not carrying campaign news, and it almost never does. In fact, newspapers generally do not. Thus, we do not have before us the public goal-serving 'agent' that Judge Endz requires if his goal reason is to have the force he envisions."

This kind of criticism is fundamental. It questions the facts upon which the challenged reason rests, including the very facts that apparently generated the case.

(2) Even if the proposed reason survives criticism (1), there might be no reliable basis for predicting the relevant effects of the decision it supports. For example, the dissenter might be able to argue: "Judge Endz predicts that newspapers will refrain from covering campaigns if they are subject to liability in cases of this sort. No evidence supports this conclusion; it is mere conjecture. On the contrary, in other states that have imposed liability for negligent libel, newspaper coverage of campaigns continues to be extensive and vigorous. But even if imposing liability will reduce the coverage of campaigns, this might still enhance democracy. The threat of liability might induce newspapers to focus on the issues rather than on personalities, and might encourage qualified persons to run for office who would otherwise refrain from doing so for fear of negligent malignment."

Or the dissenting judge might be in a position to argue: "Although Judge Endz's prediction is more probable than not, it is only barely so. His reason, although not devoid of force, is therefore extremely weak."

(3) Even if the reason survives criticism of types (1) and (2), it might incorporate a mischaracterization of some significant aspect of the predicted state of affairs. It is one thing to predict that a decision will bring about a new and different state of affairs; it is quite another to be sure of the *essential character* of that state of affairs. For example, our dissenting judge might say: "Judge Endz characterizes the predicted state of affairs inaccurately. He argues that imposing liability on newspapers for negligent libel will reduce the flow of information about candidates, and this in turn will reduce voter participation in the electoral process. This, Judge Endz says, should be characterized as diminished democratic governance. I do not agree. Factors other than mere numbers, such as the education of our voters, may be more important to democracy. After all, we don't let children vote."

(4) Even if none of the preceding criticisms is valid, analysis

might still show that the contemplated goal fails to qualify as a *social* goal, because it does not affect or instantiate a public interest. Our dissenter therefore might say: "The purportedly democratic goal cited by Judge Endz is not a social goal, but rather a personal goal of those who own newspapers. Successful pursuit of this goal will simply give publishers more interesting items to write about and thus more to sell, thereby merely furthering their own economic ends. Democracy so conceived simply cannot be a *social* goal."

This criticism obviously lacks "bite" because the reason tendered by Judge Endz incorporates a goal that inherently bears on public interests rather than on merely personal concerns. Nevertheless, not all purported goal reasons involve goals that are immune to this type of criticism.

(5) Even if the proposed goal affects or instantiates a public interest, the purported reason might still fail because the goal it incorporates proves undesirable in light of independent values. Just because pursuit of a goal is appropriately characterized and bears upon a public interest, it does not follow that the goal is good. Thus, our dissenting judge might take a dim view of democracy and argue that, although pursuit of the goal of democratic governance cited by Judge Endz affects a public interest, it still does not qualify as a good goal, because democracy is bad for society. Again, this criticism is unconvincing as formulated for the present context, but this general type of criticism might, in a particular case, easily apply.

The pursuit of a goal, then, might affect a public interest, yet the goal itself might not be good. Indeed, a goal might be intrinsically bad, or its pursuit might lead to undesirable effects.

(6) Assuming that the proposed goal reason survives up to this point, it might still fail or lose considerable force because, for example, the community already has enough subservience of the goal, either from the means envisioned in the reason or from other means. Our dissenting judge might argue: "Even if newspapers stop covering political campaigns altogether, other news media will not stop, and their coverage will be sufficient." Regardless of the probability of this particular prediction, this type of criticism will sometimes undermine proposed goal reasons.

(7) Finally, if a proposed goal reason is not well stated, whatever force it has might not be apparent and, on this basis alone, the reason might fail to support the decision.

In sum, a proposed goal reason might fail or lack force in any of the foregoing respects. But if it withstands the attack of every

type of criticism outlined above—even to the slightest degree—the reason necessarily has some force.

A judge who is proficient in evaluating goal reasons will understand, at least intuitively, how each of its constituent elements may be strong or weak, depending on relevant factors.[118] A judge must also be able to evaluate a goal reason overall—as strong or weak, or something in between. This general evaluation will take the form of a two-stage process.[119] Of course, some goal reasons will not call for such elaborate evaluation.

First, the judge must evaluate each *internal* element of the reason as strong, weak, or something in between. For every type of element (except perhaps the last), the judge might imagine a continuum from the strongest element of that type at one end (*e.g.*, highest probability of the prediction), to the weakest element of that type at the other (*e.g.*, lowest probability of the prediction). Thus, the judge might readily imagine cases in which a prediction would be quite strong, quite weak, or something in between, depending on the circumstances. At this first stage of evaluation, the judge would place each element of the reason in the appropriate place on its own special continuum. At the end of this stage, the judge will have characterized each of the reason's elements as relatively strong, relatively weak, or something in between.

With these rough characterizations in mind, the judge would then turn to the second evaluational stage. First, he would imagine a "summary" continuum stretching from the strongest possible goal reason (all elements combined) to the weakest (all elements combined). He would then summarize his specific judgments arrived at in the first stage, and place the reason, evaluated as a whole, at the appropriate point on the summary continuum. The judge would thus arrive at a judgment about the overall strength of the proposed goal reason.

This overall judgment would not be comparative. It would not lead to the conclusion that the reason is stronger or weaker than some other goal reason. An extremely strong goal reason might

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[118] Discharge of the evaluative task with respect to most elements calls for still further analysis, which cannot be attempted here.

[119] I do not claim that my account of this process is entirely a rational reconstruction of actual practice; but I believe it is consistent with that practice and accurately reveals it in many significant respects. Holmes, for example, consciously practiced something similar to the "continuum" evaluation I reconstruct here. *See, e.g.*, Noble State Bank v. Haskell, 219 U.S. 104, 112 (1911); Haddock v. Haddock, 201 U.S. 562, 631-32 (1906) (dissenting opinion); Commonwealth v. Rogers, 181 Mass. 184, 186, 63 N.E. 421, 423 (1902).

still be weaker than a competing goal reason; the latter, for example, might incorporate a goal of more importance to the community, or might promise more long-term goal realization.

Implicit in this analysis is a general model of the ideal goal reason. The features of this ideal reason can now be meaningfully rendered explicit:

(1) All facts relevant to the construction and evaluation of the reason are indisputably true.

(2) The judge has an unquestionably reliable basis for predicting decisional effects, and the prediction itself is highly certain.

(3) The judge accurately characterizes the predicted state of affairs in all relevant respects.

(4) The predicted state of affairs affects or instantiates public interests—not merely the personal interests of the parties or of the judge; thus, the future state of affairs clearly serves (or disserves) a possible *social* goal.

(5) The predicted state of affairs serves (or disserves) a social goal that is without doubt generally good in light of all relevant values.

(6) The predicted increase in goal subservience is plainly needed in the community (or the predicted decrease in goal subservience is plainly prejudicial to the community).

(7) The reason is well formulated.

Although it is abstract and idealized, this model is not a personal or utopian contrivance that I have conjured up without reference to the realities of common-law decisionmaking. Most aspects of the model are derived from the goal-reasoning practices of common-law judges. In this respect, the model represents a rational reconstruction of actual judicial practice. I do not say that judges are methodologically self-conscious about this process. Indeed, their general lack of self-consciousness makes it necessary to *reconstruct* the steps in their reasoning and the elements that correspond to each of those steps. Nevertheless, most judges are to some extent aware of most features of the model. This is especially evident from the types of critical reasons found in dissents and concurring opinions.[120]

The model is also ideologically neutral, except insofar as any form of goal rationality might be considered ideological. It can

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[120] *See generally* APPELLATE JUDICIAL OPINIONS, *supra* note 6, ch. 8; Stephens, *The Function of Concurring and Dissenting Opinions in Courts of Last Resort*, 5 U. FLA. L. REV. 394 (1952).

therefore accommodate both a wide variety of goals and evolutionary changes in goals. Judges of earlier times and different places could and may have used it.

I believe that judges would perform their evaluational work more successfully if they consciously followed this model and evaluated each element of a proposed goal reason, and each reason as a whole, in terms of its proper place on a continuum—at least when the nature of the particular reason calls for such systematic evaluation. Judges who proceed in this manner should be taken in less often by a bad goal reason, and should more often recognize when one reason is stronger than another.

The process, however, cannot be mechanically employed. Several evaluative steps are complex and often controversial. This is true, for example, of prediction and goal evaluation. Moreover, adherence to the procedure cannot guarantee that a judge will always evaluate a reason well. But, at minimum, the model provides a way to structure the exercise of judgment systematically, pointedly, and comprehensively. Many evaluations made by judges who follow the procedure will inevitably be rough, but they are likely to be more refined than those arrived at by judges who follow no systematic method at all.

It may be objected that judges who strive to structure their judgment in this way will become so self-conscious that they will end up unable to give any good goal reasons at all; just as the proverbial centipede lost all capacity for forward motion when he started watching his legs, the judge might lose his capacity for reasoning and deciding. Justificatory activities, however, are quite different from bodily movements, the coordination of which may be diminished by too much self-conscious attention. Unlike walking, which becomes completely second nature, the construction of a legal justification must remain to a great extent a formal and deliberative process—something that cannot be done well without reflection and the conscious exercise of judgment.[121]

C. *The Bearing of Institutional Reasons*

I have so far said nothing about the bearing of institutional reasons on the construction and evaluation of goal reasons. Institutional reasons are goal reasons or rightness reasons that relate to how judicial roles and processes bear on the decisional and jus-

[121] On thinking about thinking, see A. FLEW, THINKING ABOUT THINKING (1975).

tificatory jobs of judges. Examples include: "This is not the kind of goal that courts ought to adopt and implement without legislative approval"; or, "Since courts cannot readily measure the damages resulting from this type of alleged wrong, we will not recognize it as a wrong."

Some types of institutional reasons might be conceptualized either as internal elements of goal reasons or as autonomous institutional reasons. Suppose, to take an extreme example, that our newspaper libel case arises during a labor shortage that is seriously affecting the city's economy. One judge might argue in support of imposing liability that the decision would force the newspaper into bankruptcy, and would thus free its employees to make needed repairs on an important bridge. Other judges would certainly object that this reason does not embody the kind of goal that a court ought to adopt. Courts, they will argue, are not in the business of managing the economy generally, let alone the local labor market.[122] These judges might readily concede that the reason would qualify as a good goal reason "if we were a legislature." But courts are not legislatures; they are institutionally limited in function.[123]

Perhaps we should conceptualize the foregoing criticism as an attack on an internal, institutional element of the proposed goal reason, which weakens or annihilates the reason *on its own terms.* If so, we might add to my earlier account of the various elements of a goal reason a further element—namely, the goal incorporated in the reason must be one that a court may properly adopt. On the other hand, the objection might be conceptualized not as an attack on an internal element of the goal reason, but rather as an independent reason going to the institutional propriety of proposed judicial action. Regardless of how it is conceptualized, however, the force of this institutional consideration as an argument against exclusively judicial adoption of the proposed goal should be apparent.

Why, then, do I treat all considerations of institutional propriety as a separate type of reason? Such treatment is, I think, more faithful to current judicial practice. On the whole, judges appear to categorize institutional reasons separately. Moreover, this approach

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[122] *Cf.* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 224, 359 P.2d 457, 464, 11 Cal. Rptr. 89, 96 (1961) (dissenter argues that court should leave abolition of governmental tort immunity to state legislature).

[123] In addition, the objecting judges might argue that the proposed goal reason incorporates a faulty means-end hypothesis: even though the newspaper's demise will free its employees to work elsewhere, it is highly unlikely that they will have the desire or the qualifications to work on the bridge.

avoids the intermingling of institutional and noninstitutional concerns, and thus increases the likelihood that each type of concern will receive due consideration. After judges construct and evaluate goal reasons on their own terms (as I have now narrowly conceptualized them), they should always go on to consider the institutional appropriateness of giving them. In pursuing this strategy, judges may bring to bear autonomous institutional reasons that weaken or nullify proposed goal reasons.

D. *The Legitimacy of Goal Reasons*

A skeptic might argue that goal reasons are not really reasons at all because they do not bring genuine values into play. Judges rarely challenge the legitimacy of goal reasons on this ground, however, presumably because goal reasons so often implicate such tangible, "real-life" values as safety, health, peace and quiet, clean air, and voter participation.

Nevertheless, judges and others do sometimes question the legitimacy of goal reasons on the ground that they necessarily sacrifice the individual to the common good.[124] It might be argued, for example, that the refusal to impose liability for negligent libel in the name of preserving sources of information and voter participation, in effect, sacrifices the claim of an injured party to the perceived good of the community. In my view, however, this is not a decisive objection to the legitimacy of goal reasons as such. How much force they have in particular cases is one thing; whether they have any force at all is quite another. Perhaps some courts accord them too much force. In a given case, a goal reason with some force might still justifiably give way to a conflicting rightness reason that favors the individual's interests.

Furthermore, some judges and commentators argue that goal reasons are inappropriate bases for common-law decisionmaking because resort to such reasons always calls for an exercise of the democratic will—solely a legislative function.[125] But judges regularly give goal reasons in common-law cases, and, in my view, this practice is legitimate. Not all goal reasons call for an exercise of the democratic will. Of course, judicial reliance on a particular goal reason in a given case might be institutionally inappropriate.

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[124] Judges have argued this in conversation with me. *See also* Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 567 (1972).

[125] *See, e.g.*, Dworkin, *Hard Cases*, *supra* note 27; Winfield, *Public Policy in the English Common Law*, *supra* note 27.

Note, finally, that goal reasons also play important justificatory roles in daily life. It might be thought that, while judges must always decide with society's interests in mind, the goal reasoning of individuals outside the law is inherently egoistic and self-regarding. But this is clearly untrue; some private goal reasoning is purely altruistic, and much is both altruistic and egoistic at the same time. If we abandoned goal reasons entirely, we would drastically diminish our justificatory resources both inside and outside the law.

V

CONSTRUCTION, EVALUATION, AND LEGITIMACY OF RIGHTNESS REASONS

Rightness reasons constitute the second basic variety of substantive reasons found in common-law cases. A rightness reason derives its justificatory force not from predicted goal-serving effects of the decision it supports, but from the applicability of a sound sociomoral norm to a party's actions or to the state of affairs resulting from those actions. Reasons of this type do not derive their force from what the future will bring. Rather, most rightness reasons derive their force from how the past came about.[126]

The facts and decisional context of a case might generate only a rightness reason or only a goal reason. On the other hand, reasons of both types might be available, and these might conflict or be mutually supporting.

I now turn to the construction and evaluation of rightness reasons. I will treat these reasons in the same basic fashion as I treated goal reasons. This will call for some restatement. But there will be significant variations, too, which reflect the fundamental differences between these two types of reasons.

As I have already explained, there are two main subspecies of rightness reasons: (1) those that depend for their force on the culpability or nonculpability of a party's past actions; and (2) those that depend for their force on the fairness or unfairness of leaving the parties "as is" in light of their past interaction.

A. *Construction*

Rightness reasons are internally complex, far more so than commonly supposed. Judges cannot construct rightness reasons in

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[126] For discussion of rightness reasons that are not past-regarding, see note 46 and accompanying text *supra*.

a systematic and methodologically self-conscious fashion without reference to these complexities. There is evidence that judges need to improve their capacity to construct good rightness reasons. For example, a judge might overlook a rightness reason entirely, even though the facts and decisional context make it readily available.[127] Or he might undertake to construct a rightness reason as if it were a goal reason.[128] Or he might fail to incorporate all the necessary elements of a rightness reason, by failing, for example, to bring the relevant rightness concept to bear.[129] Or he might formulate a potentially good rightness reason in conclusory terms.[130]

There are indications that some judges and lawyers do not understand rightness reasons as well as they understand goal reasons. Indeed, even some of the most thoughtful scholars only dimly understand the internal complexities of rightness reasons.[131] And I fear that my own efforts have not unraveled all knots. Thus, the analysis I offer is only tentative.

To construct a rightness reason a judge must take a series of steps to combine a variety of elements. Once again, I will use an actual case to illustrate this process.[132] Assume that the plaintiff contracts to build a mast for the defendant's boat on the plaintiff's premises. Before he finishes, the plaintiff becomes worried about the possibility of fire and proposes to buy insurance. The defendant,

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[127] *See, e.g.*, Oscar Schlegel Mfg. Co. v. Peter Cooper's Glue Factory, 231 N.Y. 459, 132 N.E. 148 (1921) (court neglects to formulate and stress following rightness reason: where price of glue rose sharply during period covered by requirements contract and plaintiff's purchase orders rose by 2500%, granting plaintiff damages for nondelivery of larger orders would be unfair, since increased requirements were neither expected nor foreseeable by defendant).

[128] *See, e.g.*, Cornpropst v. Sloan, 528 S.W.2d 188, 199-200 (Tenn. 1975) (dissenting judge begins to construct rightness reason based on fairness of imposing tort duty on shopping centers, but ultimately formulates goal reason that imposition of duty would serve "best interests of the consuming public," without fully articulating original and independent rightness reason).

[129] *See, e.g.*, International Milling Co. v. Hachmeister, Inc., 380 Pa. 407, 414, 110 A.2d 186, 189 (1955) (court uses fraud concept where bad-faith concept more appropriate).

[130] *See, e.g.*, Groves v. John Wunder Co., 205 Minn. 163, 168, 286 N.W. 235, 237 (1939) (in choosing "cost of completion" over "difference in value" as measure of damages in construction-contract case, court states as rightness reason merely that plaintiff should have benefit of "lost" bargain).

[131] *Compare* Rosenberg, *Methods of Reasoning and Justification in Social Science and Law: Comments*, 23 J. LEGAL EDUC. 199, 202 (1970) (brilliant law professor analyzes rightness reason as "position based on value preferences"), *with* Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1199 (1975) (almost as brilliant professor quoted in survey analyzes rightness reasons as requiring "very little data—only a strong ethical idea").

[132] Mercanti v. Persson, 160 Conn. 468, 280 A.2d 137 (1971).

after carelessly checking his own policy, says to the plaintiff: "I'm sure I have coverage already." The plaintiff relies on the defendant's careless representation and does not procure insurance. A fire for which neither party is responsible destroys the boat and mast when the work is nearly completed, and the defendant's policy does not cover the loss. The defendant refuses to pay for the pile of ashes, and the plaintiff sues for the contract price.

Assume that the Uniform Commercial Code would impose the loss on the plaintiff, subject to section 1-103 which authorizes judges to resort to any "general equitable principles."[133] Let us suppose, too, that the plaintiff introduced evidence of the foregoing facts, and the trial judge instructed the jury that if they found the facts as the plaintiff had alleged, they must, under section 1-103, find for the plaintiff on a theory of "estoppel by negligence." The defendant excepts to this instruction, the jury returns a verdict for the plaintiff, and the defendant appeals. The case is one of first impression, and the appellate court must now decide whether to affirm or reverse.

I will now sketch (though not necessarily in sequence) the steps that a methodologically self-conscious judge might take in constructing a "culpability" rightness reason that supports the trial judge's instruction. I will also identify the internal element of the reason that figures in each step.

(1) First, the judge must determine from the proceedings below and the general decisional context all facts relevant to the culpability of the defendant's action: Who did what to whom? With what results?[134] Why? In what type of situation? In the present case, for example, did the defendant make a representation? What facts bear on the ease with which the defendant could have determined the actual extent of his insurance coverage? Did the defendant's statement cause a loss to the plaintiff? Did the plaintiff rely? What circumstances bear on the possible foreseeability to the defendant of the plaintiff's reliance? (Note that such questions might necessitate inquiry into the parties' states of mind.[135])

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[133] For a general discussion of this section, see Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 NW. L. REV. 906 (1978).

[134] Note that concepts of causality play important roles in both goal reasons and rightness reasons. In goal reasons, however, *decisional* effects play a distinctive role.

[135] In contrast, a judge might also inquire into state of mind when he formulates a goal reason, but not for the purpose of determining culpability. Instead, the judge will typically seek to determine the likely effects of the decision on persons acting subsequently with the same state of mind.

(2) In light of the facts ascertained in step (1), and in light of an inventory of *possibly* relevant concepts of culpability (provisionally identifiable also in step (1)), the judge must determine, intuitively or otherwise, which concepts of culpability are in fact relevant to characterizing the defendant's action. This will often require sensitive analysis of the potentially relevant concepts and their careful particularization. Thus, in our example, concepts of negligence and responsibility for one's careless statements would seem to be most relevant in characterizing the defendant's action.

(3) The judge must then determine, in light of relevant rightness values, whether it is possible to formulate a sociomoral norm of rightness that incorporates the concepts identified in step (2), and would, if applicable to the facts, require (or not require) the party who caused the loss to make amends. Thus, a judge in our case might tentatively formulate the relevant norm (including an "amends-making" aspect) as follows:

> A person should not carelessly induce another to rely on a false representation when the representor can readily ascertain the falsity of his representation and can reasonably foresee the other party's reliance. One who does so, without more, should bear the foreseeable loss caused to the relying party.[136]

(4) Having formulated the norm, the judge must go on to evaluate its soundness in light of independent rightness values. The norm formulated in step (3), for example, might or might not be widely shared in society. If it is widely shared, but in light of independent values the court ought not to recognize it, then the justificatory force of any rightness reason that incorporates the norm cannot be fully genuine; much of this force must be merely conventional.[137] Evaluation of a norm must be distinguished from

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[136] Norms formulated at this step might warrant injunctive relief as well. In such cases, the judge would consider whether the projected action against which the relief is sought *would be* culpable.

Although I focus in this Article on damages and injunctions, the remedial apparatus of the common law extends beyond these devices. Furthermore, while I concentrate on cases involving past interaction of the parties, not all common-law cases involve such interaction.

[137] I do not claim that when the law recognizes a culpability concept embedded in a rightness norm (through a court's reasons for decisions and doctrinal formulations), the concept or the norm never undergoes alteration. Indeed, the culpability concept employed by the law may differ significantly from the concept that a moral spectator would employ in judging the same action in a nonlegal setting for a nonlegal purpose. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 6 (4th ed. 1971); *id.* § 4, at 18. Nor do I claim that social morality is monolithic; on some issues it is clearly pluralistic.

its formulation, if only because judges (and others) tend to take the soundness of a formulated norm for granted if it is widely shared in the community.[138]

The rightness reason now taking shape in our example might be stated as follows: "Since the plaintiff relied on the defendant's careless misrepresentation and the defendant could reasonably have foreseen this reliance, the defendant should bear the resulting loss." In my view, the rightness norm generating this reason is not only widely shared in our society, but is also worthy of judicial recognition in light of rightness values that are independent of community acceptance. Thus, if the reason holds up through the remaining steps, it will have genuine justificatory force.[139]

(5) Next, the judge must evaluatively characterize the relevant facts—here the action of the party against whom relief is sought—in light of the concepts of culpability identified as relevant in step (2) and embodied in the norm formulated in step (3). In the present case, for example, the judge must ask: Did the defendant actually exercise due care in determining the extent of his coverage? Could the defendant have reasonably foreseen the plaintiff's reliance?

Note how this step differs from steps (2) and (3). It is one thing to survey the facts in order to identify which concepts of culpability are relevant and to determine whether a norm can be formulated that incorporates these concepts. It is another to evaluatively characterize the facts by applying the relevant culpability concepts (itself often a complex act of judgment).[140]

(6) The judge must then apply the rightness norm formulated in step (3) to the facts as characterized in step (5), and decide which disposition of the legal issue *most accords* with the norm as applied to the facts. Thus, in our example, if the defendant through lack of

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[138] *See* H. L. A. HART, LAW, LIBERTY AND MORALITY 17-24 (1963).

[139] Norms themselves may be highly complex, but I will not consider this here. For the growing literature on norms, see, for example, H. KELSEN, ESSAYS IN LEGAL AND MORAL PHILOSOPHY 83-94 (O. Weinberger ed. 1973); J. RAZ, PRACTICAL REASON AND NORMS (1975); A. ROSS, DIRECTIVES AND NORMS 78-138 (1968); R. SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS (1975); E. ULLMANN-MARGALIT, THE EMERGENCE OF NORMS (1977).

[140] Appellate judges sometimes confront a clean slate, and have the opportunity to formulate every element in the construction of a reason. *See, e.g.*, Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905). At other times, they must share this work with the trial judge or jury in accordance with a division of functions specified in the law. For example, a factfinder may, when the law considers a question to be one of fact, perform a characterization function (as in negligence cases), and the appellate judge may lack the authority to recharacterize the relevant facts.

due care induced foreseeable detrimental reliance, then, without more, we might conclude that the instruction of the trial judge in the illustrative case should be upheld and the judgment affirmed.

(7) Finally, the judge must formulate the reason clearly, and in appropriately general terms. For example: "Since the plaintiff relied on the defendant's careless misrepresentation and the defendant could have reasonably foreseen this reliance, the defendant should pay damages for the loss he caused. Judgment affirmed."[141]

In the foregoing account, the reason ultimately given will have force if elements (1) through (7) are appropriately combined. I cannot treat here the various elements in detail, or explore the distinctive capacities required of a judge who sets out to construct a rightness reason. I must omit subtleties and complexities. Whole books and articles have been devoted to the culpability concepts that figure in rightness reasons; these include such wide-ranging and complex notions as due care, desert, and good faith.[142] To identify and particularize these concepts, specify their content, and apply them to the facts, judges must rely on moral intuition and exercise sensitive judgment. The very question of whether a court ought to recognize a particular rightness norm may be highly controversial. What types of argument and evidence are relevant to the recognition of a norm has not yet been the subject of extended study, although judges regularly engage in such argument and marshall such evidence. My account also omits discussion of the capacities required for the faithful evaluative characterization of facts and states of affairs.[143] For purposes of this Article, what I have already said must suffice.

I have so far illustrated only the construction of a culpability-based rightness reason. The foregoing analysis applies equally, however, to rightness reasons based on mere fairness. Thus, even if the defendant did not carelessly misrepresent the facts, he might still be held responsible if it would be unfair to leave the resulting loss on the relying plaintiff. Construction of this reason would fol-

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[141] As I noted with respect to my outline of the construction of a goal reason (*see* note 110 *supra*), my aim here is simply to illustrate the construction of one available rightness reason. Before reaching a final decision in an actual case, the judge must usually proceed to formulate any other supporting or opposing rightness reasons and goal reasons and then resolve the conflicts.

[142] *See, e.g.*, Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

[143] For a perceptive discussion, see J. FRANK, COURTS ON TRIAL 37-61 (1966).

low the same seven steps, except that the judge would formulate and apply a rightness norm embodying a particular concept of unfairness. In legalistic terms, "estoppel by negligence" is not the only rationally recognizable form of estoppel. Here, mere "estoppel in pais" might suffice, even if the defendant was not negligent.[144]

Analysis of rightness reasons merely in terms of "justice and equity between the parties" is really no analysis at all. Yet judges and others frequently offer little more than this familiar phrase.[145] My account of rightness reasons qualifies as an analysis of their anatomy and physiology. Moreover, because my analysis breaks rightness reasons down into elements that provide subjects for reasoned argument, the analysis can be used to rebut the charge that rightness reasons are merely "conclusory" and thus without legitimacy.[146]

The seven steps and their corresponding elements also provide a schematic "blueprint," with specifications of required materials, that a methodologically self-conscious judge might follow to construct a good rightness reason. The analysis enables us to see just how a rightness reason has force—in metaphorical terms, how it "fires," "functions," or "goes through." Of course, step-by-step adherence to the blueprint will not always generate a good rightness reason. The required resources might be unavailable, or the judge might lack the necessary skills and judgment.[147]

Rightness reasons should not be equated with what some theorists call "rights" reasons—reasons based upon moral rights.[148] Similarly, rightness reasons should not be identified with "natural law." Nor does the distinction between goal reasons and rightness reasons closely parallel the distinction between so-called teleological and deontological reasons.[149] Rightness reasons are also different

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[144] *See generally* M. BIGELOW, A TREATISE ON THE LAW OF ESTOPPEL ch. 18 (6th ed. J. Carter rev. 1913); Jackson, *Estoppel As a Sword*, 81 L.Q. REV. 84 (1965).

[145] *See, e.g.*, Mercanti v. Persson, 160 Conn. 468, 479, 280 A.2d 137, 142 (1971).

[146] *See* text accompanying notes 169-70 *infra*.

[147] I do not claim that the facts and decisional context of a case can generate only one rightness reason. In the illustrative case, there might have been a further rightness reason flatly contrary to the decisive one—namely, that the plaintiff did not justifiably rely, and therefore really brought the loss on himself. Formulation of this reason would again involve following the seven-step procedure outlined above. But this would not necessarily require formulating a further and distinct rightness norm from scratch. The norm already stated in step (3) could be explicitly revised to allow for the possibility that a competing reason of this sort might arise in a particular case.

[148] *See, e.g.*, Dworkin, *Hard Cases*, *supra* note 27.

[149] Discussions of teleological and deontological theories can be found in almost any elementary text. *See, e.g.*, W. FRANKENA, ETHICS 15-17 (2d ed. 1973).

from most reasons of "equity" that interest economists.[150] These topics, although of great importance, lie beyond the scope of this Article.

B. *Evaluation*

Judges must not only construct rightness reasons but also evaluate and grade them, and judges do not always perform these tasks well. For example, a judge might purport to give a good rightness reason when he lacks the required facts or some other necessary element.[151] Or a judge might discard or deemphasize a rightness reason that should figure prominently in his opinion.[152] Indeed, he might fail to select and stress the best reason of all supporting his decision.[153] Or he might evaluate a rightness reason as if it were a goal reason, and so employ inappropriate standards.[154] Or he might give a rightness reason likely to grow into a legal weed.[155]

A judge should bear in mind that the internal complexities and the potential strengths and weaknesses of rightness reasons differ

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[150] In various contexts, economists use the term "equity" to refer to a property interest, to equality of income distribution, to a fair distribution of costs, and to a variety of other concepts.

[151] Failure to recognize that a purported rightness reason lacks the necessary factual foundation is perhaps the most egregious form of misevaluation. *See, e.g.*, Gerhard v. Stephens, 68 Cal. 2d 864, 892-95, 442 P.2d 692, 714-16, 69 Cal. Rptr. 612, 634-36 (1968) (one element of court's rightness reason was reasonableness of party's expectation that unused mineral rights might someday prove valuable, but party apparently lacked any basis for expectation). A more subtle form of misevaluation takes place when the judge mischaracterizes the facts and as a result applies an inappropriate rightness norm. *See, e.g.*, Marks v. Gates, 154 F. 481, 483 (9th Cir. 1907) (in suit for specific performance of "grubstake" contract, court characterizes parties' transaction as simple quid pro quo exchange, rather than as investment in uncertain venture; consequently, court applies inappropriate fairness norm of gross inadequacy of consideration and denies relief).

[152] *See, e.g.*, Mitchill v. Lath, 247 N.Y. 377, 160 N.E. 646 (1928) (court fails to appreciate fully that decision will result in patent injustice to losing party).

[153] *See, e.g.*, Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (court gives dubious goal reason—promotion of economic system—yet fails to articulate robustly independent and conclusive rightness reason—employer's gross bad faith and overreaching).

[154] *See, e.g.*, McConnell v. Commonwealth Pictures Corp., 7 N.Y.2d 465, 475, 166 N.E.2d 494, 500, 199 N.Y.S.2d 483, 490-91 (1960) (dissenting judge appears to attack rightness reason given by majority on ground that decision will have bad consequences).

[155] *See, e.g.*, Greenspan v. Slate, 12 N.J. 426, 439, 97 A.2d 390, 396-97 (1953) (court holds that "normal instincts of humanity and plain common honesty" require that parents compensate others for "necessaries" furnished their children in emergency even in absence of express or implied contract, but court fails to provide clear guidelines for determining, *e.g.*, what counts as "emergency" and what notice must be given, thus opening door to undesirable forms of intermeddling by third persons).

from those of goal reasons. Thus, the evaluation of rightness reasons requires a different analysis, and calls for the exercise of different skills and sensibilities. To evaluate a proposed rightness reason systematically, a judge must advert to each of the various elements that figure in its construction and consider their interrelation. To illustrate, suppose that a judge in our boat-mast case, Judge Normz, proposes to hold the boat owner liable to the builder for the contract price. In support of this decision, he offers the following reason: "The plaintiff foreseeably relied on the defendant's careless misrepresentation as to insurance coverage."

Now, let us imagine a dissenting judge who attempts to formulate a comprehensive set of criticisms of the proposed rightness reason—a criticism for each element. Although some of the imagined criticisms will be unsound with respect to the specific reason offered by Judge Normz, they nonetheless illustrate the relevant types of criticism that might figure prominently in other cases.

(1) The evidence supplied by the record and the decisional context might fail to establish that the defendant acted under the circumstances and with the state of mind (if any) required for the reason. For example, the dissenting judge might be in a position to say: "Judge Normz does not have the facts straight. The defendant never really made a representation about insurance coverage. In fact, the statement attributed to him was not a representation—it was only a guess." The critic thus challenges the brute facts of the episode, and seeks to show that the proposed reason lacks the factual basis upon which its force depends. Rightness reasons, it must be remembered, are generated by applying sociomoral norms to facts, and norms of this nature have their own discrete ranges of factual application.

(2) Even if the necessary facts are established, the rightness concept brought to bear might be irrelevant or misparticularized. For example, the dissenting judge might say: "The relevant concept here is that of ill desert or nondesert, not want of due care, as Judge Normz would have it."

(3) Although the rightness concept might be relevant and appropriately particularized, it might be impossible to formulate a norm that incorporates the concept *and* calls for the making of amends (or the recognition of a defense) in the type of case at hand. In our hypothetical case, for example, Judge Normz formulated the following norm:

> A person should not carelessly induce another to rely on a false representation when the representor can readily ascertain the

> falsity of his representation and can reasonably foresee the other party's reliance. One who does so, without more, should bear the foreseeable loss caused to the relying party.

Our dissenter might concede that the norm aptly embodies the relevant rightness concept, but argue that the formulation is too broad and authorizes relief in cases where relief would be unjustified (or supports a defense in cases where the defense should not be recognized). Although this criticism appears unconvincing in the context of the present case, it illustrates a type of criticism that may have force in other cases.[156]

(4) Even if the norm is aptly formulated to authorize relief (or the recognition of a defense) in the type of case at hand, the norm might not be one that, in light of relevant values, the court ought to recognize.[157] For example, in opposition to the norm formulated by Judge Normz, our dissenter might argue for a "caveat relier" principle—*i.e.*, a person should be allowed to represent whatever he wants, and those who intend to rely on his representations should bear the burden of determining their accuracy.

(5) Although the proposed reason survives the first four types of criticism, the action of the party against whom relief is sought might not be susceptible to the evaluative characterization required to bring the rightness norm into play. For example, the dissenting judge might say: "Judge Normz evaluatively mischaracterizes what happened here. The defendant boat owner was not really careless, for the reasonable man cannot be expected to understand an insurance policy. Such policies use ordinary words in very odd ways. As a matter of law, the defendant cannot have failed to exercise due care."[158]

(6) Even if the proposed reason survives to this point, it might still lose force because the decision it purportedly supports is not the decision, among the alternatives, that *most accords* with the

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[156] For a case in which the majority agreed that the rightness concept embodied in a norm was infringed but did not agree that the infringement warranted relief, see Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).

[157] For an example of a controversial rightness norm, see *id.* (couple should not bring illegitimate child into world). *See also* Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928) (Cardozo, C.J., speaking for majority, and Andrews, J., dissenting, disagree on whether joint venturer ought to bear absolute duty to inform coventurer of any offers made by third persons regarding property involved in joint-venture agreement, even though offer concerns development of property after agreement expires and clearly falls beyond agreement's scope). For a discussion of the necessity to evaluate such norms, see Bodenheimer, *supra* note 12, at 394.

[158] *See generally* note 140 *supra*.

applicable norm. Thus, the dissenter might argue: "Judge Normz has failed to see what his reason is a reason *for*. He says it best supports a decision holding the owner fully liable to the builder, but I say it best supports a decision apportioning the loss between the parties."

This criticism might seem to be aimed more directly at the use of a reason than at the reason itself. The justificatory force of a rightness reason, however, depends partly on the degree of accordance between decision and norm (as applied to the actions of the parties). Reasons for decisions cannot have force in a void. They have force only in relation to decisions, and have more force in relation to some decisions than to others.

(7) Finally, if the proposed reason is not well stated, whatever force it has might not be apparent and, on this basis alone, might fail to support the decision.

A proposed rightness reason might be evaluated in each of the foregoing respects. But a judge must also evaluate reasons as a whole—as strong or weak, or something in between. Again, using the tentative analysis I propose in this Article, a judge might systematically evaluate a rightness reason as a whole in a two-stage process. Of course, many rightness reasons will not call for such elaborate evaluation.

At the first stage, the judge must evaluate each of the seven elements as strong, weak, or something in between. For each type of element (except perhaps the last), he might imagine a continuum from the strongest element of that type at one end (*e.g.*, an appropriate evaluative characterization of a clearly careless misrepresentation), to the weakest element of that type at the other (*e.g.*, a highly questionable characterization of a statement as a careless misrepresentation). Thus, the judge might readily imagine cases in which an evaluative characterization would be highly appropriate, not appropriate at all, or something in between. At this first stage of evaluation, the judge would place each element of the reason in the appropriate place on its own special continuum. At the end of this stage, the judge will have characterized each of the reason's elements as relatively strong, relatively weak, or something in between.

The judge would then turn to the second evaluational stage. He would begin by imagining a "summary" continuum stretching from the strongest possible rightness reason (all elements combined) to the weakest (all elements combined). He would then summarize his specific judgments arrived at in the first stage, and

place the reason, evaluated as a whole, at the appropriate point on the summary continuum. The judge would thus arrive at a judgment about the overall strength of the proposed rightness reason.

This overall judgment would not be comparative. It would not lead to the conclusion that the reason is stronger or weaker than some other reason. An extremely strong rightness reason might still be weaker than a competing rightness reason which, for example, incorporates a rightness concept that is more significant.

Implicit in the foregoing analysis is a general model of the ideal rightness reason. The features of this ideal reason are:

(1) All facts relevant to the construction and evaluation of the reason are indisputably true.

(2) The rightness concepts brought into play are indisputably relevant and appropriately particularized.

(3) A rightness norm can be formulated that clearly embodies the relevant rightness concepts *and* authorizes relief (or the recognition of a defense).

(4) The rightness norm is one that the court plainly ought to recognize in light of relevant values.

(5) The evaluative characterizations that apply the concepts embodied in the norm to the facts are indisputably appropriate.

(6) The decision supported by the reason is the one most clearly in accordance with the applicable norm.

(7) The reason is well formulated.

Note that this model is "norm-neutral"; it can accommodate both a wide variety of norms and evolutionary changes in norms.[159] Thus, judges of earlier times and different social outlooks could and may have used the model.

I believe that judges who systematically follow the model to construct and evaluate rightness reasons will generally do their work better than judges who do not. Certainly judges must exercise judgment; they cannot apply the model mechanically, or expect that step-by-step adherence will guarantee the best results. At minimum, however, the model provides a blueprint for structuring the exercise of judgment systematically, pointedly, and comprehensively. Although many of the judgments reached by judges who follow the model will inevitably be rough, they are likely to be more refined than those arrived at by judges who follow no systematic method at all.

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[159] For an example of an evolving norm, see Florida Publishing Co. v. Fletcher, 340 So.2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977).

C. *The Bearing of Institutional Reasons*

My approach in this Article is to treat institutional reasons distinctly. An institutional reason, it will be recalled, is a goal reason or a rightness reason that relates to the bearing of judicial roles and processes on judicial decisions and justifications. For example, a judge might say: "A decision for the plaintiff would require us to recognize a wholly new rightness norm so controversial that we should leave it to the legislature to enact a statute that incorporates it." Or a judge might say: "In particular cases, courts will be unable to ascertain the adjudicative facts necessary to determine whether the proposed rightness reason applies; thus, a decision based on this reason would be unsound because it would introduce a rudderless precedent."[160]

As already noted with respect to institutional reasons and goal reasons, we might conceptualize some types of institutional reasons as internal elements of rightness reasons. But the considerations that militated against incorporating institutional reasons into goal reasons[161] militate against their incorporation into rightness reasons as well. Thus kept distinct, a rightness reason may be good on its own terms, yet an institutional reason may come into play to override, diminish, or nullify it. Moreover, an institutional reason may independently influence the way in which a court implements or gives legal effect to a rightness reason and its underlying sociomoral norm; as a result, the *legal* embodiment of the norm may differ significantly from corresponding manifestations in moral or other nonlegal contexts. For example, institutional considerations account in large part for the law's definition of negligence in objective rather than subjective terms, although the values and norms of daily life in which the legal concept of negligence is rooted often take subjective factors into account.[162]

D. *The Legitimacy of Rightness Reasons*

Judges and others sometimes challenge rightness reasons as illegitimate. Although most judges do not appear to be generally

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[160] *See, e.g.*, Li v. Yellow Cab Co., 13 Cal. 3d 804, 823-24, 532 P.2d 1226, 1240, 119 Cal. Rptr. 858, 872 (1975) (court notes that adjudicative facts required for allocation of fault are frequently indeterminable).

[161] *See* text accompanying notes 122-23 *supra*.

[162] Thus, for various institutional reasons, a court might adopt an objective test of negligence that does not recognize subjective differences in skill or intelligence, although these might be highly relevant in determining an actor's degree of *moral* fault. The difficulties that would arise if courts gave full recognition to such differences are readily apparent. *See generally* O.W. HOLMES, THE COMMON LAW 107-11 (1938).

skeptical of rightness reasons, those who have expressed such skepticism include some luminaries.[163] Of course, a judge who is skeptical of rightness reasons because, for example, he considers them conclusory, and who is also skeptical of goal reasons because he thinks only legislators may resort to them, is likely to suffer paralysis in a case of first impression.

What are the sources of skepticism about rightness reasons, and what should be said in response? These questions merit consideration,[164] but they also lead into waters turbulent with philosophical controversy, which I cannot enter here. Instead, I will follow, and at times even intermingle, several strategies. I will propose explanations for the skeptic's stance—explanations designed not to refute him, but to liberate him. I will offer some counterarguments. I will appeal to the usual willingness even of skeptics to embrace goal reasons. (Judges, lawyers, and law professors who are skeptical of rightness reasons are rarely skeptical of *all* substantive reasons.) Finally, I will let the burden of proof with respect to the legitimacy of rightness reasons fall where it should —on the skeptic. In the following discussion I address each of a variety of skeptical positions.

1. *"Rightness Reasons Are Not 'Real' Reasons"*

Some who are skeptical of rightness reasons not only favor goal reasons, but apparently think that goal reasons are the only *real* reasons.[165]

Some might think that a real reason must somehow involve the court in *doing* something. On this view, goal reasons clearly qualify as real reasons because they hypothesize decisional effects. Since rightness reasons do not contemplate such effects, they cannot be real reasons.

Similarly, some will argue that a goal reason qualifies as a real

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[163] Several passages in Holmes's most famous essay strongly suggest a bias in favor of "considerations of social advantage," which I take to mean goal reasons. *See* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467-69, 474 (1897). Similarly, in Vegelahn v. Guntner, 167 Mass. 92, 105-06, 44 N.E. 1077, 1080 (1896) (dissenting opinion), Holmes stated that the "true grounds of decision are considerations of policy and of social advantage"—again an apparent reference to goal reasons.

[164] It is important to confront skepticism about rightness reasons if only because it might sometimes adversely affect judges in the performance of their regular tasks. Although such skepticism rarely appears in judicial opinions, judges occasionally voice it in other settings.

[165] *See* note 163 *supra*. Roscoe Pound, who was himself a judge for a time, evolved his theory of interests without according an appropriately distinctive place to rightness reasons. *See* note 9 *supra*.

reason because it is instrumentalist in character. A goal reason "operates" through an intervening mechanism—a decision that produces effects. Thinkers brought up in our technological age as "social engineers" and "instrumentalists" naturally sense the genuineness of goal reasons, because such reasons envision future effects. Rightness reasons, on the other hand, cannot qualify as real reasons because they are noninstrumentalist—they look only to the past or to the present.

In this scientific age, the goal-minded individual is also likely to be an "empiricist." For him, a reason must turn on facts—not just the facts of a particular case, but general facts of social causality. Rightness reasons are not real to the empiricist, since they typically do not turn on such general facts. Rather, they depend on facts about the actions of the parties, or states of affairs resulting from those actions—facts of the particular case.

Further, a skeptic might think that a real reason, or at least one that a public official may appropriately give, must concern the "public interest." Goal reasons meet this test because they serve social goals—goals that affect or instantiate the interests of the community. Because rightness reasons regard only what is right between the parties, they cannot be real reasons.

Finally, to some skeptics at least, goal reasons seem to involve something like what economists call cost-benefit analysis, a kind of calculational rationality that eminently qualifies them as reasons. Since rightness reasons involve nothing of the sort, they cannot, on this view, be real.

Some of these forms of skepticism rest on invalid factual assumptions. It is untrue, for example, that the recognition of rightness reasons only has significance as between the parties.[166] But even if all of the foregoing skeptical propositions are true, none of them counts as an *argument* for the thesis that only goal reasons are legitimate. They boil down to little more than the bare assertion that nothing can be a reason unless it has the essential attributes of a goal reason. As such, they beg the question or merely express a prejudice.

As between the skeptic and the true believer in rightness reasons, who ought to bear the burden of persuasion? Who ought to produce arguments denying or affirming that reasons other than goal reasons have justificatory force? For several reasons the

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[166] *See* text following note 46 *supra*.

burden should fall on the skeptic. First, the skeptic has to explain away far more than the true believer. He must explain away: (1) the fact that many common-law cases rest partly or primarily on rightness reasons; (2) the apparent assumption of many judges that, even though a given goal reason sufficiently justifies a proposed decision, a further rightness reason reinforces the justification; and (3) the sense of sacrifice that many judges feel when they let a goal reason override a rightness reason.

Furthermore, the skeptic must explain away not only many features of the common law, but also many corresponding features of daily life, since judges often resort in common-law cases to rightness reasons that people give regularly in nonlegal contexts. Genuine rightness reasons are not just ritualistic or technical justifications conjured up by a priesthood clad in judicial robes. Wholesale abandonment of rightness reasons would vastly diminish our justificatory resources outside, as well as inside, the law. It would rule out, at least in giving reasons, such familiar concepts as desert, good faith, fair reliance, fault, and inequity. Dispensing with such concepts would, in fact, make us quite different people, for concepts so fundamental help to define our very nature.

With the burden of persuasion cast upon his shoulders, the skeptic must produce genuine arguments that rightness reasons cannot serve as justifications of common-law decisions. I now turn to what some of those arguments might be.

2. *"Rightness Reasons Are Too Personal and Subjective To Count as Legal Reasons"*

This form of skepticism is of ancient lineage. And it is not unusual to encounter it today. Decisions explicitly based on rightness reasons in the old Court of Chancery sometimes drew the criticism that they varied with the "length of the lord chancellor's foot."[167] More modern versions of this skepticism are usually expressed in less colorful terms: "The judge based his decision on personal preferences," or "The judge relied on subjective value judgments." Note that the skeptic does not deny the genuineness of relevant values. He merely asserts that invoking these values to

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[167] TABLE TALK OF JOHN SELDEN 43 (F. Pollock ed. 1927). For a recent allusion to the chancellor's foot in a skeptical vein, see Stream v. CBK Agronomics, Inc., 79 Misc. 2d 607, 608, 361 N.Y.S.2d 110, 112 (Sup. Ct. 1974) ("But, as has oft been seen, there is little room for the Chancellor's foot to rotate in the law of bills and notes."), *modified on other grounds*, 48 App. Div. 2d 637, 368 N.Y.S.2d 20 (1st Dep't 1975).

decide cases is a matter of subjective preference.[168] This subjectivist form of skepticism may be subdivided into several strands.

One strand might be called the "value plurality" thesis. On this view, judges who rely on rightness reasons bring into play a nearly infinite variety of rightness values in judging actions or states of affairs, and decisions in given cases will differ depending on which values the particular judges prefer. Hence, any decision is "subjective" to the extent that it rests on rightness reasons. Two aspects of this thesis are questionable. First, it is simply untrue that an infinite variety of values will be relevant to the decision of every case. The potentially significant values are usually quite limited. It is impossible to prove this without inordinately extended discussion of a wide range of cases, and I cannot enter upon that here. I will rest instead on a familiar truth—namely, that *facts govern and circumscribe the relevance of values*. Not just any value will be relevant to any set of facts; every value has a limited factual "range." Furthermore, it is simply untrue that judges cannot agree on which values are relevant to given actions and states of affairs. Judges commonly agree at least on the legal issue, and such agreement also narrows the set of potentially relevant values. For example, most judges "know" when a case involves unjust enrichment rather than justified reliance. The existence of ready agreement in most cases is something the "value pluralist" must explain away.

A second strand of subjectivist skepticism might be called the "no-shared-values" thesis. This view can be stated as follows: "Even if rightness values are not infinitely plural, and even if judges can at least generally agree on which values are relevant to particular actions or states of affairs, the resulting decisions must still be highly subjective because judges simply do not agree on which values should control." This form of skepticism vastly overstates the extent of disagreement among judges; it probably springs from a preoccupation with difficult or borderline cases that present close questions of conflicting values. But not all or even most cases, actual and imaginable, fall into this category. It is possible to pose a wide range of cases that virtually all would agree should be decided in the same way on rightness grounds. Clear cases of deserving conduct, clear cases of want of due care, clear cases of justified reliance, clear cases of unjust enrichment, and so on, are not difficult to imagine. Indeed, they constantly arise.

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[168] Thus, the skeptic might concede the intrinsic goodness or desirability of values, and deny only their legitimacy as bases for judicial decisions.

A related strand of subjectivist thought might be characterized as the "value indeterminacy" thesis: "Even if rightness values are not infinitely plural and judges can generally agree on their relevance, and judges share such values and weigh them similarly, the choice of reasons (and the resulting decisions) must still be highly subjective because the relevant values are inherently indeterminate." Stated a bit differently, this thesis holds that value concepts such as "desert," "justified reliance," and "inequitable overreaching" are so extraordinarily vague, ambiguous, essentially contested, or otherwise indeterminate, that judges who apply them to characterize actions or states of affairs will inevitably make highly subjective judgments. But again, it appears that judges *do* commonly agree on the evaluative characterization of particular actions and states of affairs. This at least indicates that such concepts are susceptible of determinate application.

Admittedly, when judges give rightness reasons they rely on the values they have personally come to hold. But this does not necessarily render their decisions unreasonably subjective. Judges cannot give *any* type of substantive reason without bringing values into play. Where should judges get those values? They cannot conduct public referenda; to do so would be to abdicate the office of judging as we know it, and to risk exalting merely conventional over genuine values. In their own daily lives judges participate in society's shared stock of values; indeed, individuals are selected to be judges partly because their values are thought to coincide with those of many in the community. Some values, of course, may be appropriately characterized as "merely personal." But conscientious judges take care not to bring such values into play, and the multijudge character of our appellate courts limits the effect of purely personal notions of rightness.

Skeptics who dismiss rightness reasons are usually quick to embrace goal reasons, since goal reasons clearly qualify as "policy" reasons. Presumably, skeptics simply cannot imagine that reasons of policy might also be subjective. Of course, most of these skeptics realize that judges must frequently give substantive reasons to reach a decision in a case, and that it is therefore important that some such reasons count. Yet most, if not all, subjectivist theses can also be directed against goal reasons. Consider, for example, the claim that rightness reasons are unreasonably subjective because the judge who gives them consults only his own personal values. Does a judge giving goal reasons proceed any differently? In setting goals, judges can sometimes consult legislative or other official

pronouncements, but these guideposts will not always point the way. Judges must then appraise purported goals as good or bad, or as better or worse than conflicting goals to be served by alternative decisions. How are they to do this? Again, they cannot hold public referenda, nor should they. Instead, judges must consult their own values and debate those values with counsel and other members of the court.

3. *"Rightness Reasons Are Conclusory or Question-Begging"*

One form of skepticism about rightness reasons apparently rests on the view that such reasons are inevitably conclusory or question-begging.[169] Of course, a conclusory or question-begging "reason" is no reason at all, and therefore cannot justify decisions. A genuine reason must appeal to something independent of the decision to be justified.[170] In contrast, a conclusory or question-begging reason merely characterizes the decision to be justified, or restates some point in issue along the way to the decision.

A good rightness reason appeals to a number of elements independent of the decision to be reached. A rightness reason must appeal to an applicable norm of right action. Thus, to justify a decision for the plaintiff boat-mast builder in our earlier case, a judge might appeal to what lawyers call estoppel—a rightness norm. But the content and soundness of such norms are independent of particular rulings or decisions. Moreover, the justificatory force of a rightness reason depends on the combination and strength of the reason's internal elements. These factors cannot be characterized as a "mere restatement" of the legal conclusion that the reason supports.

4. *"Rightness Reasons, Even If Not Immediately Conclusory or Question-Begging, Are Ultimately So"*

The rightness skeptic might also deploy a kind of "normative regress" argument. Consider this imaginary dialogue:

True Believer: Let's take a hypothetical case. Suppose Edgar

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[169] Such skepticism is of ancient lineage, too. *See, e.g.*, Millar v. Taylor, 98 Eng. Rep. 201 (K.B. 1769). A colleague, Professor Alan Gunn, has suggested to me that one reason some tort theorists so vigorously pursue economic analysis today may be that they think all rightness reasons are merely conclusory. But see the important writings of Richard Epstein and George Fletcher, tort theorists who are not skeptical of rightness reasons. *E.g.*, Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975); Fletcher, *supra* note 124.

[170] "[J]ustification consists in appealing to something independent." L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 265 (G. Anscombe trans. 1953).

knows his dog will bite, yet he carelessly lets the dog loose and it bites Betsy, an innocent victim. I think Edgar deserves to compensate Betsy. Stated in these terms, this is a rightness reason.

Skeptic: I see. But isn't your reference to the concept of desert *immediately* conclusory or question-begging?

True Believer: No. In stating a reason, one typically dispenses with a full exposition of all that goes into its formulation. In my example, I implicitly appealed to an independent norm calling for reparation whenever it is said that a person deserves to be held responsible.

Skeptic: I think I follow you, and perhaps agree up to this point. But at some *ultimate* point your reasoning becomes conclusory or question-begging, doesn't it?

True Believer: How so?

Skeptic: Well, why is it a reason to decide that Edgar deserves to pay Betsy, even assuming that he was at fault and she was an innocent victim?

True Believer: Because this would give Betsy her just due.

Skeptic: So what?

True Believer: Well, interpersonal decency is worth having in itself.

Skeptic: Why?

True Believer: It won't do for you to stand there and keep asking "so what?" or "why?"; you doubtless subscribe to some values yourself, don't you?

Skeptic: Well, yes, I do.

True Believer: Name one.

Skeptic: Well, I've decided some pollution cases on the ground that my decision would bring more health to the community. Now there's a *real* value for you.

True Believer: Human health?

Skeptic: Yes.

True Believer: But so what?

Skeptic: What do you mean "so what?" Can't you see that health is valuable?

True Believer: Oh, I see! So you *do* think there must be some stopping point? But if so—if there must be some stopping point in this kind of exercise—then, provided it is not merely arbitrary, our arrival at that point in regard to a given reason should not make that reason "ultimately" conclusory or question-begging, should it?

Skeptic: Well . . . .

This exchange shows that the skeptic's "normative regress" ar-

gument is a two-edged sword; it can be effectively turned against him. Any such regress must stop somewhere. Thus, if no reason can be a "real" reason unless it is always possible to give a satisfactory "reason behind the reason," then nothing will ever count as a reason. Admittedly, the true believer would be expected to say a great deal more about the nature of interpersonal decency in the foregoing dialogue. But the skeptic would be subject to the same demand in asserting that human health is a value.

5. *"Rightness Reasons Are Moralistic or Judgmental, and Involve 'Playing God'"*

Some judges seem reluctant to give rightness reasons because they view those who give such reasons as moralistic or judgmental and thus willing to impose their moral code on others. The solution to this problem (to the extent that it *is* a problem) is to avoid giving bad rightness reasons. It is sobering to recall that goal reasons, too, can be badly formulated, misconstrued, or misapplied. Yet, presumably, the skeptic would not consider this an argument against resorting to goal reasons.

In this secular age, some judges probably approach rightness reasons cautiously or even skeptically because they associate some of these reasons with specific religious origins. Judges who take this attitude, however, fall victim to the genetic fallacy. Even if all rightness reasons could be traced to specific religious teachings, this should not taint those reasons, even for the nonreligious. Reasons must be judged by their intrinsic worth, not by their origins.

In summary, the skeptics have yet to prove their case against rightness reasons.[171] At the very least, enough has been said to take some wind out of their sails. Judges who feel uneasy about rightness reasons should put aside many of their misgivings. By doing so, judges can bring more tools to their work. This should make for better decisions and better justifications.

E. *The Need for Rightness Reasons*

Some skeptics might concede the legitimacy of rightness reasons, yet claim that they are unnecessary. These skeptics might

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[171] A further complex source of skepticism about rightness reasons is the view that when a rightness reason apparently has force, this is really because a goal reason has also been set forth or is lurking in the background. This "reducibility" thesis is discussed in Part VII *infra*.

think that judges can always give sufficient goal reasons for a decision, since every decision has effects which will always serve, directly or indirectly, some social goal. Only the unimaginative judge, such skeptics will argue, cannot "harness" causal relations to the framework of goal reasons that are sufficient to decide a case.

But is this so? It is true that both a goal reason and a rightness reason may be available to justify a decision. Thus, a decision might subserve a good end *and* accord with a sound rightness norm. In the boat-mast illustration, for example, a decision for the relying plaintiff would facilitate future economic exchange by encouraging people to participate in relationships in which they cannot obtain perfect information and must rely on the representations of others. At the same time, such a decision would compensate the party who justifiably relied upon another's carelessly chosen words.

In some cases, however, a good goal reason will be unavailable. There might be no relevant social goal, or the causality might be far too speculative, or the community might already have enough fulfillment of the goal. Indeed, any of a goal reason's necessary elements might be lacking. When a judge reaches the bottom of the goal-reason barrel, however, he has not necessarily run out of reasons.[172] One or more rightness reasons may still be available.

Even when the justificatory resources of a case generate both a goal reason and a rightness reason and both support the same decision, it still does not necessarily follow that the rightness reason lacks justificatory significance. Standing alone, the goal reason might be too weak to provide sufficient justification for the proposed decision; the judge must then add the force of the rightness reason. The rightness reason, if well articulated, will not only strengthen the justification, but also make the precedent more intelligible, and thus easier to interpret and follow in future cases. In the latter respect, the rightness reason will not be superfluous even when the goal reason alone suffices to justify the decision.

Furthermore, the justificatory resources might generate conflicting goal reasons, and the judge might need a rightness reason to break the resulting stalemate. Similarly, the case might generate a goal reason and a countervailing rightness reason. Here the judge might resolve the conflict by resorting to differences in

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[172] There are numerous cases in which judges give only rightness reasons. *See, e.g.*, Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948); Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940).

the strength of the reasons or by invoking further rightness reasons.[173]

VI

Differences Between Goal Reasons and Rightness Reasons

It is possible and worthwhile to study goal reasons and rightness reasons separately, each on their own terms. Judges must regularly construct and evaluate both types of reasons, and they are likely to do this better if they understand the internal complexities of each reason type. There are, however, important differences between these two types of reasons. I have yet to confront these differences directly and draw them together in one place. But it is important that judges grasp these differences. A judge cannot fully understand the internal workings of each type unless he understands what sets one apart from the other. In addition, the judge who grasps these differences will be less likely to confuse the two types of reasons in his decisional and justificatory labors.[174] The differences are important in other ways, too, which I will indicate en route. But the significance of many of the differences will be best understood only after setting forth what they are, and after considering whether rightness reasons are ultimately "reducible" to goal reasons.[175]

A. *Inherent Differences*

Some differences between goal reasons and rightness reasons are more or less "inherent." These contrast with "contingent" differences, which I will treat in the following section. Several inherent differences are related, some rather closely.

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[173] Of course, goal reasons and rightness reasons frequently conflict. In forthcoming work, I will consider the possibility of devising a systematic decision procedure for resolving such conflicts.

[174] Even sophisticated judges who have thought and written about justification have confused the reason types. For example, it has been suggested that all judicial reasoning is a matter of pragmatic "trial and error," a characterization that does not felicitously apply to rightness reasons. *See generally* B. Cardozo, The Nature of the Judicial Process 98-99 (1921). See also Dewey, *Logical Method and Law*, 10 Cornell L.Q. 17, 26-27 (1924), in which all reasons are characterized as consequentialist.

[175] I am indebted to Mr. Leigh Kelley for discussion and assistance in preparing this Part and Part VII *infra*.

1. *Sources of Justificatory Force*

A goal reason derives its force from the fact that, at the time it is given, the decision it supports can be predicted to serve a good social goal. A rightness reason, however, derives its force from the fact that the decision it supports accords with a sound rightness norm applicable to a party's past action or to the state of affairs resulting from that action.

A goal reason thus requires an appropriate prediction—a causal relation between the supported decision and desired social effects. A rightness reason, on the other hand, requires an accordance between the supported decision and an applicable socio-moral norm—a noncausal relation. A goal reason involves a means-goal hypothesis. Theoretically, this hypothesis can be verified; in time, the predicted decisional effects—effects entirely *external* to the decision—either will or will not have occurred. Rightness reasons are fundamentally different. The reason-giver does not purport to predict the future effects of a decision that implements the reason. Rather, the essential relation of accordance between decision and norm either exists or does not exist at the time of decision. Any prediction that a state of affairs will result from the decision is irrelevant to the force of a rightness reason.[176] If a judge sets out to construct a rightness reason but then raises the prospect of desirable decisional effects, he is in fact undertaking to construct a goal reason, and his labors must take on a different character.

If the prediction on which a particular goal reason rests proves erroneous, it does not necessarily follow that the reason had no force at the time of decision. Of course, if a prediction fails repeatedly, this would bear on the force of the goal reason when given in future decisions. Similarly, events subsequent to a decision based on a rightness reason—*e.g.*, newly discovered evidence or a growth in moral enlightenment—might also lead the judge to revise his earlier judgment that his decision accorded with an applicable norm. But this has nothing to do with the failure of a prediction.

Hence, proficiency in constructing and evaluating the two

[176] Admittedly, judicial authorization of some process for implementing the decision in the future must figure in a rightness reason. (This may involve, for example, a money judgment, an injunction, or a judgment denying both.) But authorization of such process is simply part of what is meant by a judicial decision in the first place. Hence, nothing specific to a rightness reason itself qualifies as a goal external to the decision.

types of reasons calls for different knowledge and capacities. For example, a judge might be skillful in making the predictions required for goal reasoning, but lack the moral intuition, the conceptual sophistication, or the sensitivity to the meaning and significance of norms necessary for rightness reasoning.

2. *Objects of Evaluation*

The construction of a substantive reason requires evaluation of its internal elements. Since these elements differ, the objects of evaluation in the two types of reasons will differ as well. The construction of goal reasons requires a determination of whether posited goals are good, and whether predicted decisional effects serve the posited goals. The construction of rightness reasons, on the other hand, requires the evaluative characterization of past actions or the states of affairs resulting from those actions. This in turn calls for the exercise of the intuitive and conceptual skills needed to select, particularize, and apply relevant evaluative concepts. A judge engaged in this process must also evaluate the accordance between alternative decisions (including the methods of their implementation) and applicable rightness norms. Often he will have to evaluate the soundness of rightness norms themselves. Of course, this last form of evaluation is not limited to rightness reasons, since some goal reasons contemplate more rightness. In the construction of rightness reasons, however, it is *always* required.

3. *Effectiveness of Implementation—Its Bearing on Justificatory Force*

A good rightness reason that favors a decision for the plaintiff does not lose its force even though, at the time of decision, the defendant has no money to pay damages or will be unable to comply with an injunction. A rightness reason will always have force, regardless of whether an effective remedy is available, if a decision for the wronged party accords with the applicable rightness norm —a relation of accordance unrelated to cause and effect. If a judge knew at the time he gave a goal reason, however, that the decision it supported could not be implemented, this would nullify or reduce the force of the reason, since the essential prediction of decisional effects would fail, at least in the particular case.

B. *Contingent Differences*

Some features only "contingently" differentiate goal reasons and rightness reasons. These differences emerge only when specific instances of goal reasons and rightness reasons are compared.

1. *Nature of Values*

The values that figure in specific instances of the two types of reasons do not necessarily differ in character. Most goal reasons look to the realization of welfare values or "public goods"—*e.g.*, more productive uses of resources, more economic exchange, more health, more peace and quiet, more safety, more clean air. Other goal reasons, however, look to the realization of more rightness.

Rightness reasons, on the other hand, necessarily regard rightness—specific conceptions of what is just, equitable, fair, deserving, faithful, etc. It follows that *most* goal reasons differ from *all* rightness reasons in that most goal reasons look to the realization of values other than rightness in and of itself.

2. *"Achievability"*

Although it rarely happens in practice that a goal is fully achieved, in principle most goals that look to the realization of welfare values or "public goods" are achievable. If a goal has been sufficiently achieved, it is no longer appropriate to give a reason in the name of that goal. Thus, judges sometimes abandon a goal and refuse to decide in its name because "we have had enough fulfillment of that goal."[177] The same is not true of norms. That judges should at some point stop giving a particular type of rightness reason "because we have had enough fulfillment of the relevant norm" smacks of the absurd, since rightness norms, unlike most goals, are incapable of such fulfillment.

3. *Factual Requirements*

Judges can usually give rightness reasons without inquiring into facts outside the record. But goal reasons call for predictions, and thus frequently take judges into the realm of general social facts, including the causes and cures of social ills. Frequently such facts will not appear in the trial transcript, which contains "adjudicative facts"—for the most part, facts of the specific case.[178]

Occasionally, however, a judge giving a rightness reason must also go beyond the adjudicative facts. For example, equality of

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[177] *See, e.g.*, Siragusa v. Swedish Hosp., 60 Wash. 2d 310, 318, 373 P.2d 767, 773 (1962) (court abandons goal of protecting fledgling industry).

[178] For the distinction between adjudicative and legislative facts, see authorities cited in note 63 *supra*.

access to the media might be a rightness consideration bearing on the decision in a libel case, and general social facts relevant to media access might not appear in the record.[179] The judge in this case would have to undertake an inquiry similar to that called for by most goal reasons.

4. *Necessity of Reference to the Past*

Since rightness reasons call for an evaluative characterization of past actions or the states of affairs resulting from past actions, some might think that only rightness reasons look to the past. Goal reasons, however, also direct a judge's attention to past facts: those that make up our accumulated knowledge of social causation.

Even so, the past plays significantly different roles in the construction of the two types of reasons. In giving a goal reason the judge looks back merely to "draw a bead on the future"—to "line up his sights" on what lies ahead. In contrast, the judge who gives a past-regarding rightness reason *must* look back to identify and apply the relevant rightness norms. He is not concerned with the past for the light it may shed on the future; instead, the past provides the essential reference point for bringing his values to bear. Thus, in giving rightness reasons a judge cannot dismiss the past as "sunk costs" or "spilled milk."

In sum, particular instances of the two types of reasons may differ in a substantial number of respects. There is no one, simple "distinction" between the two types, but a variety of differences.

VII

Reducibility of Rightness Reasons to Goal Reasons

In previous sections I have discussed the two basic types of substantive reasons, their internal elements, the manner in which these elements are combined, and a variety of important respects in which goal reasons and rightness reasons differ. I have also responded to arguments challenging the need for and legitimacy of rightness reasons. If I am right, the differentiation of the two types of reasons cannot be merely formal—*i.e.*, merely a matter of whether a judge chooses to formulate a reason as one type or the other. Instead, the two types must be substantively distinct and mutually exclusive.[180]

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[179] *See, e.g.*, Taskett v. King Broadcasting Co., 86 Wash. 2d 439, 546 P.2d 81 (1976).

[180] Nevertheless, a few judges, lawyers, and two law professors have insisted in discussions with me that "the distinction" is "merely formal."

Yet the claim is made, occasionally by judges and more often by law professors, that the justificatory force of a rightness reason is always "reducible to" or "derivable from" the justificatory force of an available goal reason.[181] If some version of this reducibility thesis is true, judges should recognize it, for only then would they fully understand the complex justificatory practices in which they participate. Furthermore, judges who thus came to understand these practices could, once they constructed a relevant rightness reason, always go on to identify and articulate the goal reason on which it "rests." Having thus laid bare the true basis of justification, judges would be better able to reach the best results and better able to justify them.

I cannot thoroughly explore here the complex issue of reducibility. I will identify and rebut only two forms of the reducibility thesis. I will then briefly explain why, even if some version of the thesis is true, my theory of substantive reasons survives almost unscathed.

A. *Reducibility of Rightness Reasons to "Parasitic" Goal Reasons*

A parasitic goal reason derives its justificatory force primarily from the conjunction of two factors: the rightness reason that justifies an original, precedent-setting decision, and the doctrine of precedent itself.[182] For example, a decision based primarily on a "good faith" rightness reason generates, in a precedent system, a further goal reason: it is predictable (or so it is said) that similarly situated parties will follow the precedent and act in good faith. Thus, because precedential consequences qualify as goal-serving effects of the precedent, its underlying rightness reason becomes ultimately goal-serving, however rightness-oriented it might originally be.

This form of the reducibility thesis is unpersuasive. Even if precedential consequences are goal-serving in this way, they only *add* to the justification for the decision. This added force stems from the doctrine of precedent, not from any goal-subservience of the decision itself. Furthermore, whether a precedent-setting decision will produce more rightness in the future depends on whether the decision accords with rightness in the first place. Thus, even if an original rightness-based decision always gives rise, through the doctrine of precedent, to a further goal-serving reason ("bring about more such rightness"), if the original decision rested on a

[181] Again, such claims have heen made to me in discussion.

[182] *See* text accompanying notes 46-48 *supra*.

rightness reason that had no justificatory force, the corresponding goal reason would itself lack force, since it could not involve bringing about *more rightness*.

Moreover, without a system of precedent, a rightness reason would still have force in the particular case. At least there is no reason to suppose that its force necessarily depends on projected precedential effects. On the contrary, if the theory of rightness reasons I offer is correct, the force of such reasons derives from the applicability of rightness norms that are primarily past-regarding or present-regarding.

Even under a system of precedent, it is often predictable that a decision based on a rightness reason will influence few, if any, parties in the future. Indeed, there might be no relevant "future," for the decided case might be the last one in the pipeline before the effective date of a statutory reform. Or the decided case might involve factual peculiarities that make it virtually impossible that a similar case will ever occur. But even if the decision does have a "future," many if not most persons whose activities fall within its scope might fail to learn of the decision or grasp its bearing. They might fail to act on the decision because they lack sufficient incentives, because they disagree with it, because the law itself provides that compliance is optional, or for a host of other reasons. Yet even if such factors limit or nullify the future impact of a decision, this does not mean that the decision is poorly justified. Our reducibility proponent, however, would have to say as much.

B. *Reducibility of Rightness Reasons to Independent Goal Reasons*

Below are several illustrative claims that a reductionist might make when confronted with cases in which the judge explicitly set forth only a rightness reason. In responding to each example, the reductionist might assert that a goal reason is available either in the particular case or generally in such cases.[183]

(1) "Behind justified reliance (concededly a rightness reason) I see the facilitation of economic exchange."

(2) "Behind punitive desert (concededly a rightness reason) I see the deterrence of socially undesirable conduct."

(3) "Behind due care (concededly a rightness reason if confined to basic respect for persons and property) I see community safety for persons and property."

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[183] Although a goal reason might be unavailable in a particular case, it does not necessarily follow that goal reasons are generally unavailable for cases of the same general sort.

(4) "Behind doing equity as between the parties (concededly a rightness reason) I see the prevention of disorderly self-help."

In the foregoing examples, the reductionist does not claim that the rightness reason derives whatever force it has from the decision's precedential effects of bringing about more rightness. Rather, he claims that whatever force the rightness reason has derives from an implicit yet independent goal reason available in that very case or generally available in such cases. This type of reductionist views the implicit goal reason not as a parasitic reason concerned with bringing about more rightness (through stare decisis), but as an independent goal reason purportedly securing values wholly apart from rightness—values such as increased productivity, deterrence of dangerous actions, protection of persons and property against inadvertent hazards, and fostering peaceful settlement of disputes.

Two considerations cast doubt on this view. First, it seems odd, or at least incongruous, that different pairs of reasons in which such different values figure could be reducible, one to another. How can "protection of justified reliance" be reduced to "facilitation of economic exchange"? How can "punitive desert" be reduced to "deterrence of socially undesirable conduct"? How can "respect for persons and property" be reduced to "general safety," or "equity" to "prevention of disorderly self-help"? Yet the reducibility thesis calls for the assimilation of such disparate values, and for the anomalous equation of reasons that turn on such disparate concerns. Each of the rightness reasons listed above apparently incorporates all of the required elements of a rightness reason. And, at least to judges, the values that figure in these reasons apparently qualify as intrinsic values, desirable for their own sake and not necessarily instrumental to the realization of other values allegedly "behind" them. Why then should these reasons not be considered autonomous?

Furthermore, judges commonly give rightness reasons as the primary grounds for their decisions. Often they do not even refer to goal reasons.[184] These judges apparently intend that their opinions be taken at face value, and they are usually so taken. In all such cases, the reductionist must argue that the rightness reason really derives its force from some implicit goal reason (available in the particular case, or generally). Yet even where a judge has found and explicitly referred to such an "underlying" goal reason,

[184] *See* illustrative cases cited in note 172 *supra*.

I know of no instance where he has acknowledged that it provides the sole support for the decision. Can we dismiss widespread and long-standing justificatory practices, common both inside and outside the law, as fragmentary and essentially unsophisticated? The reductionist seems to take this view.

C. *Differences Again*

The arguments I have considered here for the reducibility thesis are at best inconclusive. Whether rightness reasons are reducible to goal reasons is a complex question to which we do not have an answer. But it is undeniable that rightness reasons figure prominently in judicial justification and differ in substantial ways from goal reasons.

Nevertheless, even if the justificatory force of rightness reasons ultimately derives entirely from accompanying or implicit goal reasons, it still would not follow that judges could always dispense with constructing and evaluating any available rightness reasons, and concern themselves solely with goal reasons. For example, there might be a certain type of goal reason that only has justificatory force if it incorporates or is accompanied by a rightness reason. If so, the rightness reason would be an essential component or concomitant of the goal reason, and if any internal element of the rightness reason itself were absent or seriously deficient, the goal reason would accordingly lack force as well. Thus, if rightness reasons necessarily figure in at least some goal reasons, judges must understand the character of rightness reasons in order to construct and evaluate those goal reasons.

VIII

SIGNIFICANCE OF THE DUALITY OF SUBSTANTIVE REASONS

I have differentiated two basic types of substantive reasons and noted the possible importance of some specific differences between them. I now take up the general significance of this duality.

In the many cases that require resort to substantive reasons—*e.g.*, cases of first impression and cases that overrule precedent—judges must recognize and remain aware of this duality. The essential elements of good goal reasons and good rightness reasons are not identical. Moreover, the facts and decisional context of a case might generate one type of reason but not the other. The duality directs the attention of judges (and readers of opinions) to quite different facets of each case—those potentially relevant to the con-

struction and evaluation of goal reasons (future-regarding aspects), and those potentially relevant to the construction and evaluation of rightness reasons (usually, past-regarding aspects). Judges who focus separately on these different justificatory source-beds are more likely to discover all available reasons, to incorporate all the necessary elements in their construction (while excluding all extraneous elements), and to evaluate correctly the strengths and weaknesses of each reason.

I have already noted that precedents are not self-defining and self-applying.[185] To apply a precedent rationally, judges must advert to the substantive reasons behind it. Sometimes the precedent fails to state these reasons, or fails to state them clearly. Or it might be possible to formulate new and better reasons for the precedent. If judges remain conscious of the duality of substantive reasons and choose the appropriate model, they are likely to be more faithful in reconstructing and interpreting reasons that are only implicit or poorly expressed. Similarly, they should do a better job of constructing reasons from scratch.

Furthermore, the rationales for following precedent are themselves susceptible to analysis in terms of rightness norms and goals.[186] The doctrine of stare decisis varies in force and effect depending on which type of rationale supports it most strongly in a given case.

Courts regularly reevaluate precedents in deciding whether to follow, modify, or overrule them. Yet courts cannot undertake this task without applying evaluative standards. These standards fall into two categories; precedents should be judged not only by relevant goal standards but by rightness standards as well. In addition, judges should recognize that time can take different tolls on the two types of reasons. The continued force of a good goal reason depends, for example, on the continued validity of particular hypotheses of social cause and effect—hypotheses that technological developments can undermine. The force of rightness reasons is also subject to decline. For example, growing sociomoral enlightenment may lead to the alteration or abandonment of the norm on which a rightness reason depends.

Good substantive reasons also have factual requirements that vary according to type. As a result, there may be areas of the law in which one type of reason should figure more prominently

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[185] *See* Part III *supra*.

[186] I will consider this topic in forthcoming work.

than the other. For example, a "due care" rightness reason can support a course of decision only if certain "adjudicative" facts are regularly determinable. Yet many, perhaps most, high-speed accident cases suffer from a paucity of evidence relevant to the issue of due care, and consequently degenerate into "negligence lotteries."[187] This at least weakens the general case for resolving high-speed accident cases on due-care rightness grounds. Similarly, judges sometimes seek to base their decisions in water-law cases on goal reasons such as "development of regional productivity," yet frequently know too little about relevant causality to justify such reasoning.[188] Again, the introduction of sealed containers, preventing consumers from inspecting the contents, has largely undermined the factual basis for the familiar rightness principle of caveat emptor. Thus, a general failure to satisfy the factual requirements of a reason type argues against basing a course of decision on reasons of that type. Since judges in subsequent cases will be unable to determine reliably whether the resulting doctrine is applicable, the values to be served by that doctrine cannot be realized with regularity.

In deciding whether to alter the common law, judges sometimes find it relevant, in the name of uniformity, to consider trends across the country. The duality of substantive reasons provides a useful framework for identifying and interpreting trends. A judge might note that a particular rightness norm has gained or lost acceptance, or that courts have started to recognize and implement a particular goal, or that an increasing number of courts have concluded that a long-standing goal has been sufficiently realized.

The duality is also relevant when judges consider whether they should defer to the legislature.[189] For example, institutional reasons argue more strongly for deference to the legislature when a judge proposes to overrule a precedent for goal reasons alone. Rightness reasons, on the other hand, tend not to be politically controversial and so call less strongly for adoption solely by democratic bodies. In addition, rightness reasons rarely require factual inquiries beyond the fact-finding machinery of the courts. In most cases, courts also have sufficient powers to implement the values that typically figure in rightness reasons. Moreover, when judges

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[187] *See generally* Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967).

[188] *See, e.g.*, Irwin v. Phillips, 5 Cal. 140 (1855).

[189] I will deal in forthcoming work with this topic as well.

decide cases of first impression on the basis of genuine (as opposed to *merely* conventional) rightness reasons, litigants relying on old law can claim unfair surprise with far less credibility, at least when the rightness norms involved are widely shared in society.

The duality might even enhance the faith of some judges in the power of reason. Secure that they can resort to at least two legitimate wellsprings of reason, not just one, judges might refrain from watering down their opinions and generalizing their reasons simply to gain the votes of colleagues. Instead, more judges might write dissents or concurring opinions, which in the long run might well make for a better reasoned body of law.

Furthermore, a judge who recognizes the duality of substantive reasons will be a more effective advocate of his views. He will be better equipped not only to formulate reasons of his own, but also to predict what types of reasons his colleagues on the bench will marshall to support *their* positions in a case; for among the many judges who are willing to resort to substantive reasons, some may be primarily rightness-minded, some primarily goal-minded, and some a mixture of the two.[190] A judge who can anticipate the differing priorities and opposing arguments of his brethren stands in a better position to begin formulating counterarguments to win them over to his side. (This predictive capability, of course, will also aid trial and appellate advocates.)

Indeed, the duality provides a framework for analyzing the entire judicial philosophy of an individual judge. To develop this analysis we would ask not only whether the judge favored goal reasons, rightness reasons, or a combination of the two, but also: Which goals and rightness concepts figure in the judge's reasoning, which are most prominent, and how are they related?[191] (Judges

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[190] For example, a preliminary analysis of the opinions written by Judge MacKinnon of the United States Court of Appeals for the District of Columbia Circuit suggests that he is predominantly a "rightness-minded" judge. *See, e.g*, Hooks v. Southeast Constr. Corp. , 538 F.2d 431 (D.C. Cir. 1976) (in determining scope of subcontractor's duty to insure and indemnify, emphasizes contract language and nature of parties' relationship, while ignoring possible goal question of appropriate allocation of risk); Berger v. Board of Psychologist Examiners, 521 F.2d 1056 (D.C. Cir. 1975) (focuses upon fairness in particular case; downplays social goals of reducing fraud and maintaining high professional standards); Kline v. 1500 Mass. Ave. Apt. Corp., 439 F.2d 477, 488 (D.C. Cir. 1970) (dissenting opinion) (attacks majority's risk-allocation goal reason by emphasizing rightness reason that decision imposes crushing economic burden on defendant).

[191] To complete the analysis, we would also have to study the judge's use of institutional reasons and the extent to which he relies on authority reasons. This would provide far more insight into a judge's attitude and philosophy than the mere application of such labels as "activist" or "passivist."

themselves might subject their opinions to this analysis to achieve a heightened self-awareness.) Having analyzed the philosophy of a particular judge, we might consider further whether this philosophy constitutes a recognizable type, and whether this type correlates with factors in the personal backgrounds of judges who espouse it. A great judge must be a giver of good reasons and a good critic of reasons. The duality helps to explain what these complex attributes entail.

Finally, the duality represents not just an accidental but, in my view, an essential feature of the ideal conception of common law. Thus, the theory of common-law justification I offer here serves not only as a descriptive account, but also as a justification of the common law itself. Both goal reasons and rightness reasons must thrive in a healthy and resourceful system of common law.

CONCLUSION

I have set forth in this Article—tentatively and schematically—the core of a general theory of common-law justification. I have addressed myself to judges, and have focused on those reasons that have primacy in the common law—reasons of substance. But the potential ramifications of my theory extend beyond common-law justification, and, in some respects, beyond the law itself.[192] By way of conclusion, I will suggest some of the broader jurisprudential and theoretical implications.

(1) Judicial resort to substantive reasons may keep the common law more or less continuous with the morality of a society. Most substantive reasons have counterparts in daily life. That these show up in common-law justification should not be surprising. By attending to substantive reasons in the law one can discern specific and fundamental ways in which the law accommodates moral considerations (without necessarily becoming moralistic). One can thus avoid the temptation to *identify* law with morality in order to account for the bearing of morality on law.

(2) It is often said that the reasoning of judges and lawyers is esoteric or "artificial"—the province of an elite legal priesthood. But to the extent that substantive reasons spring from justificatory practices in daily life, they show themselves to be neither artificial nor the exclusive province of those trained in the law.

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[192] The theory might even have certain educational implications. Why not require a fall-semester, first-year course entitled "Reasons"? (Holmes stressed that students should strive to "get to the bottom of their subject." What better way?)

(3) Most ideas of "justice" and "injustice" found in common-law cases appear in the work clothes of rightness reasons. By studying these reasons, we should achieve a fuller understanding of justice as a distinct standard for evaluating decisions. (Note, however, that not all rightness reasons embody concepts of justice or injustice.)

(4) Rightness reasons do not fit forward-looking instrumentalist theories of law, and thus do not sit well with most "social engineers." Such theories ignore the justificatory significance of the past, except insofar as it is relevant to shaping the future through goal subservience. A sufficiently detailed account of rightness reasons might therefore serve as a corrective to the myopias of crude utilitarianism as well. Bentham was wrong to think that "thank you" means "more, please."

(5) A faithful reconstruction of the justificatory practices of judges must, in large part, map the workings of the so-called "legal mind." How judges and lawyers think when they seek to justify common-law decisions is only one facet of the "legal mind," but it is an important one.

(6) By studying substantive reasons, and particularly goal reasons, we can see precisely where and how economics, sociology, and other "policy sciences" bear on the common law. Of course, contrary to what some practitioners of these sciences believe, not all reasons are "policy" reasons, and courts can make new law without "making public policy."

(7) If my theory of substantive reasons is basically right, the very integrity, tone, and spirit of a legal order intimately depend on the way in which judges view and use rightness reasons. A legal system without decisions based on rightness reasons is imaginable but, in my view, abhorrent.

(8) Although the law is only one field within which justificatory practices occur, it is a field of distinctive significance. Judges take pride in their ability to give good reasons and correctly view reason-giving as a basic judicial function. In addition, legal records and case reports provide unusually good sources for analyzing justificatory processes. Thus, students of justification will find substantive reasons articulated in common-law cases an extraordinarily rich quarry from which to extract materials for the construction of more general theories.

(9) Common-law reasons of substance should also interest value theorists, for, among other things, such reasons invoke a wide range of evaluative notions, including some that to date have

received only scant attention. Moreover, value theorists may well conclude from their study of substantive reasons that the categories of "justice" and "utility" are not really exhaustive or sufficiently refined.

(10) The theory should also cast light on our very concept of a "reason for deciding," as distinguished from a "reason for believing." Certainly we can no longer say that having a reason for deciding is merely a matter of knowing some facts, or of bringing values into play. Furthermore, there might be something distinctive about reasons for deciding as a separate subclass of reasons for acting.[193]

My ambitions, then, for the theory I offer are considerable. And the theory itself is ambitious. Bits and pieces of it may well fall at the hands of thoughtful scholars. Indeed, fundamentals of the theory might not survive.[194] But even so, the task will have been worthy of the effort. A general theory of common-law justification is long overdue. Any failure of mine can hardly signify that a theory of this nature lies beyond us.

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[193] Note that a particular reason may have significance on three different levels, or from three separate points of view: (1) as a motive for an actor on the front line of human interaction; (2) as a reason for a judge's decision of a case; and (3) as a standard for evaluating the action taken in situations (1) and (2).

[194] Criticism of my theory of substantive reasons is, of course, invited. Such criticism might be addressed to at least the following issues:

(1) With respect to the two types of substantive reasons: (a) Does the theory account for and appropriately characterize each type's essential elements? (b) Are any of the listed elements unnecessary or readily collapsible into others? (c) Is the manner of their combination appropriately described? (d) How appropriate is it to conceptualize the evaluation of substantive reasons and their individual elements in terms of bi-polar continua? (e) Does the theory account for all the major forms of criticisms or weaknesses to which substantive reasons are subject?

(2) Are there major types of substantive reasons in the common law that the theory omits?

(3) Are institutional reasons appropriately accounted for?

(4) How genuine are the claimed differences between goal reasons and rightness reasons? Are there other differences?

(5) Are there major forms of the reducibility thesis other than the two considered here? Are there other responses to the thesis?

(6) Does the theory overstate the significance of the duality of substantive reasons? Does this duality have other forms of significance?